(22,813)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1913.

No. 64.

H. CLAY PIERCE, PLAINTIFF IN ERROR,

vs.

THE UNITED STATES.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

INDEX.

	Original.	Print
Petition for writ of error	1	1
Order allowing writ of error	2	1
Writ of error	3	2
Clerk's certificate	4	3
Summons	6	3
Amended complaint	7	4
Answer	10	5
Demurrer	13	7
Opinion, Noyes, C. J	15	8
Order sustaining demurrers	37	20
Order denying application for interest	39	21
Judgment	40	21
Assignment of errors	42	22
Bond	44	23
Citation	46	24

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1 *Petition for Writ of Error.*

Circuit Court of the United States for the Southern District of New York.

At Law.

UNITED STATES OF AMERICA, Plaintiff,
against
H. CLAY PIERCE, Defendant.

Petition for Writ of Error.

And now comes H. Clay Pierce, defendant herein, and says: That on or about the 13th day of July 1911, the Circuit Court of the United States for the Southern District of New York entered a judgment herein in favor of the plaintiff and against this defendant, in which judgment and the proceedings had prior thereto in this cause, certain errors were committed to the prejudice of this defendant, all of which will more in detail appear from the assignment of errors which is filed with this petition.

Wherefore, this defendant prays that a writ of error may issue in this behalf out of the Supreme Court of the United States for the correction of errors so complained of, and that a transcript of the record, proceedings and papers in this cause, duly authenticated, may be sent to the Supreme Court of the United States.

WILLIAM D. GUTHRIE,
Attorney for Defendant,
44 *Wall Street, New York City, N. Y.*

A copy of the within paper has been this day received at this office. Jul- 13, 1911. Henry A. Wise, U. S. Circuit Court, Southern District N. Y. Filed Jul- 13, 1911. John A. Shields, Clerk.

2 *Order Allowing Writ of Error and Supersedeas.*

Circuit Court of the United States for the Southern District of New York.

At Law.

UNITED STATES OF AMERICA, Plaintiff,
against
H. CLAY PIERCE, Defendant.

This 13th day of July, 1911, comes the defendant, by William D. Guthrie his attorney, and files herein and presents to the court his petition praying for the allowance of a writ of error, and an assign-

ment of errors intended to be urged by him, praying also that a transcript of the record and proceedings and papers upon which the judgment herein was rendered, duly authenticated, may be sent to the Supreme Court of the United States, and that such other and further proceedings may be had as are proper in the premises.

On consideration whereof the court does allow the writ of error upon the defendant's giving bond according to law in the sum of Four Thousand dollars ($4,000.00/100) which shall operate as a supersedeas bond.

WALTER C. NOYES,
United States Circuit Judge.

(Endorsed:) A copy of the within paper has been this day received at this office.—Jul- 13, 1911. Henry A. Wise, U. S. Attorney.—U. S. Circuit Court, Southern District N. Y. Filed Jul- 13, 1911. John A. Shields, Clerk.

3 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Judges of the Circuit Court of the United States for the Southern District of New York, Greeting:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the Circuit Court, before you, or some of you, between the United States of America, plaintiff, and H. Clay Pierce, defendant, a manifest error hath happened, to the great damage of the said H. Clay Pierce as is said and appears by his complaint, we, being willing that such error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at the City of Washington on the 12th day of August 1911, in said Supreme Court, to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein, to correct that error, what of right and according to the law and custom of the United States ought to be done.

Witness, the Honorable Edward D. White, Chief Justice of the Supreme Court of the United States, this 13th day of July, in the year of our Lord one thousand nine hundred and eleven, and of
4 the Independence of the United States the one hundred and thirty-sixth.

[Seal United States Circuit Court, South. Dist. New York.]

JOHN A. SHIELDS,
Clerk of the Circuit Court of the United States of America for the Southern District of New York, in the Second Circuit.

The foregoing writ is hereby allowed.

WALTER C. NOYES,
U. S. Circuit Judge.

UNITED STATES OF AMERICA,
Southern District of New York, ss:

I, John A. Shields, Clerk of the Circuit Court of the United States of America, for the Southern District of New York, in the Second Circuit, by virtue of the foregoing Writ of Error, and in obedience thereto, do hereby certify, that the pages numbered from one to 47 inclusive, contain a true and complete transcript of the record and proceedings had in said Court in the cause of H. Clay Pierce, Plaintiff in Error, against The United States of America, Defendant in Error, as the same remain of record and on file in said office.

In testimony whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, in the Second Circuit, this 20th day of July, in the year of our Lord one thousand nine hundred and eleven, and of the Independence of the United States the one hundred and thirty-sixth.

[Seal United States Circuit Court, South. Dist. New York.]

JOHN A. SHIELDS, *Clerk.*

5 [Endorsed:] Law. 4/162. E. & A. D. 3264. Supreme Court of the United States. H. Clay Pierce, Plaintiff-in-Error, against United States of America, Defendant-in-Error. Writ of Error. William D. Guthrie, Attorney for Plaintiff-in-Error, 44 Wall Street, New York City. A copy of the within paper has been this day received at this office. Jul- 13, 1911. Henry A. Wise, U. S. Attorney. U. S. Circuit Court, Southern District N. Y. Filed Jul- 13, 1911. John A. Shields, Clerk.

6 *Summons.*

United States Circuit Court, Southern District of New York.

THE UNITED STATES OF AMERICA, Plaintiff,
against
H. CLAY PIERCE, Defendant.

To the above-named Defendant:

You are hereby summoned to answer the complaint in this action, and to serve a copy of your answer on the plaintiff's attorney within twenty days after the service of this summons, exclusive of the day of service; and in case of your failure to appear, or answer, judgment will be taken against you by default, for the relief demanded in the complaint.

Witness, the Honorable Melville W. Fuller, Chief Justice of the United States, at the Borough of Manhattan, in the City of New

York, this 29th day of October, in the year one thousand nine hundred and nine.

[L. S.] JOHN A. SHIELDS, *Clerk.*

Henry A. Wise, U. S. Attorney, Plaintiff's Attorney, Office and Post Office Address, Room 50, U. S. Court and P. O. Building, Borough of Manhattan, New York City.

7 *Amended Complaint.*

United States Circuit Court, Southern District of New York.

UNITED STATES OF AMERICA
vs.
H. CLAY PIERCE.

The plaintiff above named, by Henry A. Wise, United States Attorney for the Southern District of New York, its attorney, for its amended complaint against the defendant above named, alleges, on information and belief, as follows:

First. That the plaintiff is a corporation Sovereign.

Second. That the defendant is a citizen of the United States.

Third. That on the 1st day of September, 1909, the defendant was the managing owner of the yacht "Yacona;" that the said yacht was, and is, a foreign built vessel, and that it was built in the Kingdom of Great Britain; that the said yacht had a gross tonnage of 526.14 tons; that the said yacht had not been, and was not, used or intended to be used for trade.

Fourth. That on or about the 1st day of September, 1909, the Collector of Customs at the Port of New York, that being the District nearest the residence of the defendant, fixed and determined the sum of Three thousand six hundred and eighty-two dollars ($3,682) as the sum equivalent to the tonnage tax of seven
8 dollars ($7) per gross ton upon the use of the said yacht, and thereby levied a tonnage tax in said amount upon the use of the same.

Fifth. That the said Collector of Customs at the Port of New York gave notice to the defendant of the levy of the said tax, and demanded payment thereof on the 1st day of September, 1909, prior to the beginning of this action, but no part thereof has been paid, and the defendant has not paid a duty of thirty-five per cent (35%) ad valorem upon the said yacht, in lieu of the said tax.

Wherefore, plaintiff demands judgment against the defendant for the sum of Three thousand six hundred and eighty-two dollars ($3,682), with interest thereon from the first day of September, 1909, together with the costs and disbursements of this action.

HENRY A. WISE,
United States Attorney for the Southern District of New York, Attorney for the Plaintiff.

Office and Post Office Address, Room 50, United States Court House and Post Office Building, Borough of Manhattan, City of New York, N. Y.

STATE OF NEW YORK,
County of New York, Southern District of New York, ss:

Addison S. Pratt, being duly sworn, deposes and says:

That he is an assistant to the United States Attorney for the Southern District of New York, plaintiff's attorney; that he has read the foregoing complaint and knows the contents thereof; that the same is true of his own knowledge, except as to the matters therein stated to be alleged upon information and belief, and as to those matters he believes it to be true;

That the reason why this verification is made by deponent and not by plaintiff is, that the latter is a corporation Sovereign.

That the sources of deponent's information and the grounds of his belief are communications received from the Collector of Customs of the Port of New York and the Commissioner of Navigation of the Department of Commerce and Labor.

ADDISON S. PRATT.

Sworn to before me this 16th day of June, 1910.
[SEAL.] FREDERICK L. CAMPBELL,
Notary Public, Kings Co.

Cert. filed in N. Y. Co.

(Endorsed:) U. S. Circuit Court, Southern District N. Y. Filed Jun- 17, 1910. John A. Shields, Clerk.

Answer.

United States Circuit Court, Southern District of New York.

At Law.

UNITED STATES OF AMERICA, Plaintiff,
against
H. CLAY PIERCE, Defendant.

And now comes the defendant above named by Guthrie, Bangs & Van Sinderen, his attorneys and as and for his second amended answer to the amended complaint of the plaintiff, United States of America:

I.—For a First Defense:

Alleges upon information and belief that the yacht "Yacona" has not at any time been, and is not now, registered, enrolled or documented as a vessel of the United States, and is not entitled to enjoy or exercise, and has never enjoyed or exercised, any rights, privileges or protection as a vessel or yacht of the United States.

II.—For a Second and Separate Defense:

Alleges that it was the intention of Congress in and by the Act of Congress entitled "An Act to provide revenue, equalize duties

and encourage the industries of the United States," approved August 5, 1909, and as appears upon the face thereof, that the sum thereby directed to be levied and collected upon the use of every foreign-built yacht, pleasure-boat or vessel owned or chartered for more than six months by any citizen or citizens of the United
11 States, should be an annual tax, that it should be prospective and operate only upon the future use of any such foreign built yacht, pleasure-boat or vessel, and that said annual tax did not accrue and could not be duly levied and collected prior to the first day of September in the year 1910.

III.—For a Third and Separate Defense:

Alleges that the said yacht "Yacona" was not in use by the defendant or by any other person at any time during the year next preceding the first day of September, 1909, but was out of commission and laid up unused at Brooklyn in the State of New York, throughout the whole of such year.

IV.—For a Fourth and Separate Defense:

Alleges on information and belief that at the time of the passing and approval of said act of Congress as aforesaid and of the alleged levy of said annual tax upon the use of this defendant's said yacht, there were and ever since have been in the United States and within its jurisdiction, a large number of yachts, pleasure boats and vessels not used or intended to be used for trade, and not foreign-built, which were then owned or chartered for more than six months by citizens of the United States, and which were and are similar to this defendant's said yacht in all substantial respects as to construction, character and nature of property, and identical with this defendant's said yacht in all respects as to use and as being personal property of citizens of the United States, but upon the use of which property so similarly situated no tax is imposed by the said Act of Congress, that said Act of Congress, in so far as it purports in and by Section 37 thereof to direct the levy and collection of a tax upon the use of this defendant's said yacht, is not a general law operating upon all citizens of the United States owning
12 and using like property under substantially similar conditions and circumstances, and that the levy and collection from this defendant of said sum, equivalent to a tonnage tax of seven dollars per gross ton, would not constitute the levy and collection of any tax, duty, impost or exercise within the true meaning of the Constitution of the United States, but would deprive this defendant of his property without due process of law, in conflict with the Fifth Article of Amendment to the Constitution of the United States.

Wherefore, the defendant prays that the complaint of the United States of America in the above-entitled action be dismissed with costs.

GUTHRIE, BANGS & VAN SINDEREN,
Attorneys for the Defendant.

Office and Post Office Address, 44 Wall Street, Borough of Manhattan, New York City.

UNITED STATES OF AMERICA,
Southern District of New York, ss:

H. Clay Pierce being duly sworn, says: That he is the defendant above named; that the foregoing answer is true to the knowledge of deponent, except as to the matters therein stated to be alleged on information and belief, and that as to those matters he believes it to be true.

H. C. PIERCE.

Sworn to before me this 1st day of February, 1911.
JESSE MEYERS,
Notary Public, N. Y. Co.

(Endorsed:) U. S. Circuit Court, Southern District, N. Y. Filed Feb. 2, 1911. John A. Shields, Clerk.

13 *Demurrer.*

United States Circuit Court, Southern District of New York.

At Law.

UNITED STATES OF AMERICA, Plaintiff,
vs.
H. CLAY PIERCE, Defendant.

The plaintiff above named, by Henry A. Wise, United States Attorney for the Southern District of New York, its attorney, hereby demurs to the second amended answer of the defendant to the amended complaint herein, and to each and every defense in the said answer contained, on the ground that each and every said defense is insufficient in law on the face thereof, and does not state facts sufficient to constitute a defense to the cause of action in the plaintiff's amended complaint.

HENRY A. WISE,
United States Attorney for the Southern District of New York, Attorney for Plaintiff.

Office and Post Office Address, Room 50, Post Office Building, Borough of Manhattan, City of New York.

14 STATE OF NEW YORK,
County of New York,
Southern District of New York, ss:

Addison S. Pratt, being duly sworn, deposes and says: I am an assistant to the United States Attorney for the Southern District of New York. The foregoing demurrer is not interposed for delay, and, in my opinion, the same is well founded in point of law.

ADDISON S. PRATT.

Sworn to before me this 2d day of February, 1911.
[SEAL.] FREDERICK L. CAMPBELL,
Notary Public, Kings Co.

Cert. filed in N. Y. Co.

(Endorsed:) U. S. Circuit Court, Southern District, N. Y. Filed Feb. 3, 1911. John A. Shields, Clerk.

15 *Opinion.*

United States Circuit Court, Southern District of New York.

UNITED STATES OF AMERICA
v.
CORNELIUS K. G. BILLINGS.

UNITED STATES OF AMERICA
v.
JAMES GORDON BENNETT.

UNITED STATES OF AMERICA
v.
HARRIET GOELET.

UNITED STATES OF AMERICA
v.
H. CLAY PIERCE.

UNITED STATES OF AMERICA
v.
ROY A. RAINEY.

On Demurrers to Answers.

NOYES, *Circuit Judge:*

These actions are brought by the United States to recover the annual tonnage tax upon the use of foreign built yachts under Section 37 of the Tariff Act of 1909, which is printed in full in the foot note.*

*"There shall be levied and collected annually in the first day of September by the collector of customs of the district nearest the residence of the managing owner, upon the use of every foreign-built yacht, pleasure-boat or vessel, not used or intended to be used for trade, now or hereafter, owned or chartered for more than six months by any citizen or citizens of the United States, a sum equivalent to a tonnage tax of seven dollars per gross ton.

"In lieu of the annual tax above prescribed the owner of any foreign-built yacht, pleasure-boat or vessel above described may pay a duty of thirty-five per centum ad valorem thereon, and such yacht, pleasure-boat or vessel shall thereupon be entitled to all the privileges and shall be subject to all the requirements prescribed by sections forty-two hundred and fourteen, forty-two hundred and fifteen, forty-two hundred and seventeen, and forty-two hundred and eighteen of the Revised Statutes and Acts amendatory thereto in the same manner as if said yacht had been built in the United States, and shall be subject to tonnage duty and light money only in the same manner as if said yacht had been built in the United States.

"So much of section five of chapter two hundred and twelve of

16 The complaint in each action alleges in substance that the defendant therein was, on September 1st, 1909, a citizen of the United States and the managing owner of a foreign-built yacht and that the tax in question was duly levied and has never been paid.

The defendants have severally answered, setting up separate defenses and each presenting defenses of a different nature. These defenses go both to the constitutionality of the statute and its application upon different states of facts, so that upon the several demurrers of the Government the questions of constitutionality and interpretation are clearly presented and are presented in different phases. The important questions so raised may properly be considered in this order:

(1) Is the statute so discriminatory in its provisions as to violate the Fifth Amendment to the Constitution of the United States?**

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the laws of nineteen hundred and eight, approved May twenty-eighth, nineteen hundred and eight, as relates to yachts built outside the United States and owned by citizens of the United States is hereby repealed.

"This section shall not apply to a foreign-built vessel admitted to American registry."

**Questions under other constitutional provisions are considered in the briefs. Thus the brief of the Government contains an elaborate consideration of the question whether the annual tonnage tax is an excise or a direct tax within the meaning of the Constitution. The briefs of the defendants, however, apparently concede that the tax is an excise and would be valid if it were not discriminatory and did not affect property outside the jurisdiction in violation of the Fifth Amendment. Consideration of the question whether the tax is a direct tax is, therefore, unnecessary in this opinion, although by omitting to discuss it I would not seem to indicate that I have any doubt that the Government's contention in the matter is correct.

One of the defendants raises another constitutional question by contending that the thirty-five per cent. ad valorem duty which the owners of foreign-built yachts have the privilege of paying in lieu of the annual tonnage tax, is a direct tax and is invalid because not apportioned among the States. This contention is at least doubtful. The owner is not required to pay this duty. He is merely given the option of paying it. In its nature it would seem to be a duty on imports and such duties are not held to be direct taxes requiring apportionment. But it is unnecessary to pass upon this question. These actions are for the recovery of the annual tonnage tax and the validity of the ad valorem tax is not involved. The provisions concerning that tax are separable from those concerning the annual tax. The one is not dependent upon the other and there is no indication that Congress would not have adopted the one without the other. Under such conditions it is well settled that unconstitutional provisions may be separated from legal provisions and effect be given to the latter.

17 (2) Does the statute conflict with the Fifth Amendment by levying taxes on property situated outside the territorial jurisdiction of the United States?

(3) Was the annual tax properly leviable on September 1, 1909?

(4) How far is it necessary to show actual use of the yachts during the year prior to September 1, 1909?

(5) Can the owner of a foreign built yacht acquire immunity under an earlier treaty which will exempt him from the operation of the statute?

With respect to the first question: It is pointed out by the defendants that the test of the application of the statute is (1) the place of origin of the yacht and (2) the citizenship of the owner or charterer and it is contended that the "due process of law" clause of the Fifth Amendment requires Congress, if it desires to tax yachts, to
18 make an enactment of an essentially different nature applicable to all yachts of similar character and whether owned by citizens or resident aliens. It is urged, in support of this contention, that there is no real difference between the use of a foreign built yacht and the use of a similar vessel built in the United States; nor between the use of such a vessel by a citizen and by a resident alien, and that the classifications made by the statute are arbitrary, discriminatory and without any reasonable basis.

On the other hand it is stated by the Government that the object which Congress sought to accomplish was the protection of American shipbuilders, and the promotion of American shipbuilding by forcing American citizens to buy yachts built in this country. And as it is not obvious how taxing the use of foreign built yachts already purchased would promote American industries, it is said that Congress made the statute applicable to past purchases in order that the owners of all foreign-built yachts should be taxed equally.

If the validity of this legislation depended upon satisfying this Court of its wisdom, fairness and justness, other reasons and facts than those thought necessary to be included in the Government's brief would be required. But as the Supreme Court has said (District of Columbia v. Brooke, 214 U. S. 138) "the courts cannot be made a refuge from ill advised, unjust or oppressive laws." The only inquiry to be considered here is whether this statute de-
19 prived these defendants of their property without due process of law.

"Due process of law"—guaranteed in both the Fifth and Fourteenth Amendments to the Constitution—means the law of the land. The guaranty implies the administration of equal laws according to estabished rules by competent tribunals having jurisdiction and proceeding upon notice and hearing. It affects the operations of the different departments of the government. It prevents arbitrary executive action. It applies to judicial proceedings and requires orderly procedure. It operates against confiscatory legislative enactments. It safeguards the rights of the citizen even in the exercise of the paramount rights of the state.

The power of taxation is a paramount right incident to the sovereignty of every state and is exercised by the legislative department of

the government. It rests upon the theory that the public welfare requires the sacrifice of private rights and that the value of taxes exacted from the citizen is returned to him in the benefits conferred by the government. The power to tax is broad. Chief Justice Marshall said in McCulloch v. Maryland, 4 Wheat. 316:

"The people of a State, therefore, give to their government a right of taxing themselves and their property, and as the exigencies of government cannot be limited, they prescribe no limits to the exercise of this right, resting confidently on the interest of the legislator, and on the influence of the constituent over their representatives, to guard them against its abuse."

20 But broad as is the taxing power of the federal government, there are constitutional limitations attached to its exercise. The special restraints imposed by the Constitution are that no capitation or direct tax shall be laid without apportionment; that no tax or duty shall be laid upon any article exported from a State, and that "al duties, imposts and exercises shall be uniform throughout the United States." (Const. Art. 1, sec. 8, pa. 1; sec. 9, pars. 4 and 5.) There are also undoubtedly general limitations imposed by the due process of law clause of the Fifth Amendment. Due process of law requires at least the exercise of the taxing power only for public purposes and regularity in the processes for the assessment and collection of taxes.*

These defendants, however, as I have already indicated, contend for a far broader application of the due process clause than that just pointed out, and, in effect, urge that this Court should declare the statute in question unconstitutional, because the selection for taxation of the use of foreign-built yachts is arbitrary and discriminatory. They say that that which is essential to due process of law in taxation, whether by the nation or the state, is "that a tax law must apply impartially to all persons in the same class, that is, similarly situated, and that it must operate equally and uniformly upon all persons in like circumstances and under like conditions.

21 If the Fifth Amendment were as broad as the Fourteenth, there would be more ground for these contentions of the defendants. But the Fourteenth Amendment differs from the Fifth Amendment in that in addition to the "due process of law" clause, it contains the provision that no State shall "deny to any person within its jurisdiction the equal protection of the laws." This provision is directly aimed at discriminatory legislation. Its object is to secure equality and generality in State statutes. Under this clause many decisions, both federal and state, have been rendered holding different state enactments unconstitutional as lacking the character of generality and as containing discriminatory classifications. The Supreme Court of the United States, however, has never held that the equality

*There will be occasion later to consider how far the principle that the due process clause in the Fourteenth Amendment prevents a State from taxing property located outside its territorial jurisdiction applies in the consideration of Acts of Congress in relation to the Fifth Amendment.

clause adds nothing to the scope of the Fourteenth Amendment so that decisions under it have controlling force in determining the application of the Fifth. It is true that it seems to be assumed by text writers and that there are dicta in the decisions to the effect that discriminatory legislation is as much in conflict with the due process clause as with the equality clause. But however this may be with respect to the exercise of other powers, I am satisfied that in the exercise of the taxing power, so long as Congress follows the particular constitutional provisions relating to the levying of taxes, there are no limitations upon its right to discriminate in selecting the subjects of taxation.

In McCray v. United States, 195 U. S. 27, in sustaining
22 the validity of the Oleomargarine Act, the Supreme Court, through the present Chief Justice, said (pp. 69, 61, 63):

"Since, as pointed out in all the decisions referred to, the taxing power conferred by the Constitution knows no limits except those expressly stated in that instrument, it must follow, if a tax be within the lawful power, the exertion of that power may not be judicially restrained because of the results to arise from its exercise." * * *

"Whilst undoubtedly both the Fifth and Tenth Amendments qualify, in so far as they are applicable, all the provisions of the Constitution, nothing in those amendments operates to take away the grant of power to tax conferred by the Constitution upon Congress. The contention on this subject rests upon the theory that the purpose and motive of Congress in exercising its undoubted powers may be inquired into by the courts, and the proposition is therefore disposed of by what has been said on that subject." * * *

"Conceding merely for the sake of argument that the due process clause of the Fifth Amendment, would avoid an exertion of the taxing power which, without any basis for classification, arbitrarily taxed one article and excluded an article of the same class, such concession would be wholly inapposite to the case in hand. The distinction between natural butter artificially colored, and oleomargarine artificially colored so as to cause it to look like butter, has been pointed out in previous adjudications of this court. * * * That provision [the Fifth Amendment], as we have previously said, does not withdraw or expressly limit the grant of power to tax conferred upon Congress by the Constitution. From this it follows, as we have also previously declared, that the judiciary is without authority to avoid an act of Congress exerting the taxing power, even in a case where to the judicial mind it seems that Congress had in put-
23 ting such power in motion abused its lawful authority by levying a tax which was unwise or oppressive, or the result of the enforcement of which might be to indirectly affect subjects not within the powers delegated to Congress."

And in the very recent case of District of Columbia v. Brooke, 214 U. S. 138, 149, Mr. Justice McKenna said:

"The other objections expressed the same fundamental idea, to wit, that the act discriminates between resident and non-resident owners of property, and because it does it is void. * * *

"The defendant in error asserts this discrimination and argues its

consequences at some length, but does not refer to any provision of the Constitution of the United States which prohibits Congress from enacting laws which discriminate in their operation between persons or things. If there is no express prohibition of such power, may prohibition be implied from our form of government, Upon that proposition we need not express an opinion. If prohibition exists it must rest on all the powers conferred by the Constitution. This Court, however, has just held, in the case of United States v. Delaware & Hudson Co., 213 U. S. 366, that Congress may, in the exercise of the powers to regulate commerce among the States, discriminate between communities and between carriers engaged in such commerce. And it was said that the assertion that 'injustice and favoritism' might 'be operated thereby,' could 'have no weight in passing upon the question of power.' In the case at bar we are dealing with an exercise of the police power, one of the most essential of powers, at times the most insistent, and always one of the least limitable of the powers of government."*

24 It is clear that Congress, in enacting the statute in question, acted within all the limitations of the Constitution regulating the exercise of the taxing power. As we have seen, the tax is an excise and not a direct tax. It also possesses the uniformity required by the constitutional provision. It is assessed equally on all citizens throughout the United States who own or charter foreign built yachts. It is geographically uniform and that which the Constitution prescribes is geographical and not intrinsic uniformity. This principle has been consistently adhered to in a series of decisions: Patton v. Brady, Executrix, 184 U. S. 608; Knowlton v. Moore, 178 U. S. 41; Pollock v. Farmers' Loan & Trust Co., 157 U. S., 429; Head Money Cases, 112 U. S. 580; United States v. Singer, 15 Wall. 111.

The statute, then, being in accord with all the special constitutional limitations, I should be unable to hold it in violation of the Fifth Amendment even if I were of the opinion that there exists no fair and reasonable basis for the discrimination which it makes between the owners of foreign and home-built yachts, and even if I were of the opinion that a similar discrimination would bring a state statute into conflict with the Fourteenth Amendment. It is my opinion that Congress had the right to select a certain class of property, to wit, foreign-built yachts, and to tax the use thereof by all citizens owning or chartering the same, and that such a tax law cannot be set aside by the courts because it is held to be unreasonably discriminatory. But it is unnecessary to go so far in order

25 to decide this case. Whatever may be said of the justness of the statute, it cannot be said that the discrimination which it makes against citizens owning foreign-built yachts, is without any

*The Court further said in this opinion that while is was not necessary to decide whether Congress had, broadly considered, the power to discriminate, no stricter limitation upon its power was possible, in any event, than that imposed upon the States by the Fourteenth Amendment.

substantial basis. Taxing the use of foreign-built yachts may tend, in some degree, to protect and promote American ship building. Citizens stand in a position different from aliens, whether resident or non-resident. Regarding the statute from any point of view I cannot say that it is unconstitutional class legislation.

The next inquiry is whether the statute conflicts with the due process of law clause by levying taxes on property outside the jurisdiction of the United States.

The answers of the defendants Goelet and Bennett allege that their yachts were not within the jurisdiction of the United States for several years prior to the passage of the statute and that each had acquired a permanent situs in a foreign country. The answer of the defendant Goelet further alleges that she was and is domiciled in France, and is a resident of that country.

The first question raised by the demurrers to these answers is a constitutional one; the second, one of interpretation. Assuming that the statute applies to the yachts of these defendants, is it constitutional? Should it be so construed as to apply to them?

The constitutional question presented is, as already stated, another phase of that just considered, viz.; the relation of the due process clause to this statute. If it be unconstitutional as taxing
26 property outside the jurisdiction of the United States, it is so because the levy of a tax upon such property denies due process of law to the owner thereof.

As we have seen, the theory upon which taxes are levied is that the taxpayer receives back in benefits from the government the value of the taxes exacted from him. Theoretically, the benefit received should be in exact proportion to the obligation imposed. As a corollary to these propositions it is held that the power of the State to impose taxes is limited to property within the territorial jurisdiction, because only with respect to such property is the state in a position to afford the protection and benefit due as a consideration for the tax imposed. These principles are clearly stated in the opinion of Mr. Justice Brown in Union Transit Co. v. Kentucky, 199 U. S. 194, 202, 204:

"The power of taxation, indispensable to the existence of every civilized government, is exercised upon the assumption of an equivalent rendered to the taxpayer in the protection of his person and property, in adding to the value of such property, or in the creation and maintenance of public conveniences in which he shares, such, for instance, as roads, bridges, sidewalks, pavements, and schools for the education of his children. If the taxing power be in no position to render these services or otherwise to benefit the person or property taxed, and such property be wholly within the taxing power of another State, to which it may be said to owe an allegiance, and to which it looks for protection, the taxation of such property within the domicil of the owner partakes rather of the nature of an extortion than a tax, and has been repeatedly held by this court
27 to be beyond the power of the legislature and a taking of property without due process of law. * * *

"It is also essential to the validity of a tax that the property shall

be within the territorial jurisdiction of the taxing power. Not only is the operation of state laws limited to persons and property within the boundaries of the State, but property which is wholly and exclusively within the jurisdiction of another State, receives none of the protection for which the tax is supposed to be the compensation."

In the application of these principles distinctions are necessarily drawn according to the different kinds of property. Real estate is taxed at its actual situs, irrespective of the owner's domicil. The maxim mobila sequuntur personam may determine the situs of intangible personal property for purposes of taxation. But in respect of tangible personal property the law of the owner's domicil has yielded to the law of the place where the property is kept and used. So far, at least, as the States are concerned, tangible personal property may be regarded as separated from its owner and may be taxed where located although that may not be the place of the owner's residence or domicil. And the converse of the proposition is equally true, that such property outside the boundaries of the state may not be subjected to taxation there.*

28 Upon these principles it is clear that foreign-built yachts having a permanent situs in a state other than that of their owner's domicil are with respect to state legislation subject to the lex situs rule. Such vessels are not entitled to be registered or enrolled, and can only become "vessels of the United States" by special acts of Congress. They stand for the purposes of taxation in the same position as other tangible personal property. A state tax upon a foreign-built yacht used only in another state or in foreign waters would unquestionably be invalid, irrespective of the owner's residence or domicil.

The question then is whether the principles which prevent state tax legislation from having extra territorial force apply in the same degree to federal legislation. The underlying principle, as we have seen, is that taxes are the consideration for protection afforded, and it is contended by the Government that while state tax laws may

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*The lex situs rule with respect to tangible personal property should be stated in modified form when considering vessels registered under the laws of the United States when incidentally or temporarily in a state other than that of their home port. As said by the Supreme Court in Pullman's Car Co. v. Pennsylvania, 141 U. S. 18, 23:

"Ships or vessels, indeed, engaged in interstate or foreign commerce upon the high seas, or other waters which are a common highway, and having their home port, at which they are registered under the laws of the United States, at the domicil of their owners in one State, are not subject to taxation in another State at whose ports they incidentally and temporarily touch for the purpose of delivering or receiving passengers or freight. But that is because they are not, in any proper sense, abiding within its limits, and have no continuous presence or actual situs within its jurisdiction, and, therefore, can be taxed only at their legal situs, their home port and the domicil of their owners."

be invalid as affecting property outside the state because the state is powerless to furnish protection, yet that a national enactment cannot fail for that reason because the United States Government has power to afford protection to the persons and property of its citizens abroad.

It is said that an independent nation has power to protect
29 property beyond its territorial limits which no component part of that nation can have and, consequently, that limitations upon the taxing power of the states have no necessary effect upon the validity of the present statute.*

I think it the better view that these contentions of the Government are correct. The national government has a far-reaching arm. It may afford in many ways protection to the property of its citizens located in foreign countries. In case of injury it may demand indemnity from other nations. Congress has already enacted laws with respect to the issue of certificates of ownership and passports to unregistered vessels owned by citizens (R. S. Secs. 4190, 4308) which might afford some protection in foreign countries, and it has, unquestionably, power to enact laws of much broader scope. I should be unable to hold that legislation clearly and unequivocally imposing taxes upon foreign-built yachts owned by citizens and located in foreign countries would be unconstitutional because by reason of the inability of the United States to afford protection to such property, there would be no consideration for the payment of such taxes, and the owner would be, consequently, deprived of his property without due process of law.

But such a tax would be extraordinary in its nature. If imposed it should be by clear and express enactment. It ought not to
30 depend upon any doubtful construction. If Congress desire to exercise the power of the national government to go beyond its territorial jurisdiction in levying taxes—a power inherent in the United States because it is a nation and more than a state—it ought to employ language leaving no doubt as to its intention. The presumption should be that a tax law applies only to subjects within the territorial jurisdiction. Although Congress might provide for the grant of documents to foreign-built yachts owned by citizens which would have great protective value the steps which it has taken in that direction have been slight and the passports which it has provided for are granted only to vessels departing from the United States. The statute uses broad language, but I find nothing in it or in prior legislation clearly evidencing an intention on the part of Congress to tax the use of foreign-built yachts in foreign waters and wholly outside the limits of the United States. The provisions are, in my opinion, consistent with an intention to tax only the use of such yachts in the waters of this country. Possibly the extent of

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*When, however, even a registered vessel has a continuous presence—an actual situs—in a state other than that of the owner's domicil or port of register, it is subject to taxation there. Old Dominion Steamship Co. v. Virginia, 198 U. S. 299; Hays v. Pacific Mail Steamship Co., 17 How. 596; see also Ayer & Lord Co. v. Kentucky, 202 U. S. 409; St. Louis v. The Ferry Co., 11 Wall 423.

such use may be immaterial, but I think that such use, to some extent, must be shown to bring a case within the statute.*

Furthermore, whatever doubt there might be as to the application of the statute in the case of a citizen of the United States residing in this country and owning a foreign-built yacht used only in foreign waters, there can be no question, in my opinion, that a citizen domiciled in a foreign country and owning such a yacht is not liable to the tax. Certainly the liability of a citizen domiciled and resident in France for the use of a foreign-built yacht in foreign waters should be established by clear and certain language, and in this case it is not only doubtful whether the statute applies to such use, but its language is inconsistent with its application to non-residents. The section in question provides that the tax shall be levied and collected "by the collector of customs nearest the residence of the managing owner." Who is the collector of customs nearest the residence of the defendant Goelet? Is it the collector of the most eastern district in Maine because that district is nearest to Paris? It seems evident from this provision alone that Congress considered that it was dealing with and intended only to deal with, yacht owners residing in this country.

31

The next question is whether the tax was properly leviable on September 1, 1909.

The Act went into effect on August 6, 1909. The section provides, as we have seen, that a tonnage tax "shall be levied and collected annually on the first day of September * * * upon the use of every foreign built yacht * * * now or hereafter owned or chartered for more than six months."

32

In my opinion the six months' limitation applies only to yachts chartered. Such is the natural interpretation of the language used. It might fairly be expected that a charter should run for some extended period to subject a charterer to a tax, but no particular reason appears why continued ownership for any stated period should be required. Indeed, a requirement of six months' ownership would be a direct invitation to transfers to avoid the tax.

Does, then, the fact that less than a month elapsed between the

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*It must be clearly understood that this conclusion is reached with reference to the allegations in the Bennett and Goelet answers that the yachts belonging to these defendants have not been and are not within the jurisdiction of the United States and that each has acquired a permanent situs abroad. I construe these allegations to wholly negative use in the United States and I have no intention to hold that a yacht belonging to a resident citizen may acquire any such situs in a foreign country as will permit her owner to use her to any considerable extent in the waters of the United States without paying the tax. Whether she could be so used to any extent whatever is a question not presented by the pleadings and upon which no opinion is expressed.

I construe the allegations in the Billings case to state a substantial use partly within and partly without the waters of the United States and such use I think comes clearly within the statute.

passage of the Act and September 1, 1909, establish that the full tax was improperly levied upon that date?

It is urged by the defendants that as the tax is one upon use, it ought to have some fair relation to the actual enjoyment of the privilege taxed, and that it must have been the intention of Congress, in enacting the legislation just prior to the close of the year, to lay an annual tax upon future use and not to penalize past use, and that if a tax for past use be levied it should be apportioned according to the period of actual use prior to September 1st, 1909.

There is much force in these contentions but I think that they are not well founded. The language of the statute, speaking on August 6th, 1909, is that the use of yachts "now or hereafter owned" shall be taxed on September 1st. The section says that the
33 use of yachts owned at the time of its passage or thereafter acquired shall be taxed and, in my opinion, Congress intended that such tax should be levied on the first day of every September following the enactment of the statute. While the tax is collectible annually according to a given situation on September 1st, there is nothing in the statute to indicate that a full year's use is a prerequisite to liability, nor is there any provision for apportionment. I, therefore, hold that the tax was properly leviable on September 1st, 1909. If this construction gives the statute a retrospective operation—and I fail to see that it does—it is nevertheless adopted, because it is, in my opinion, required by the unequivocal language used.

The fourth question is as to the necessity of showing actual use of the yachts during the year prior to September 1st, 1909.

One of the defendants alleges in his answer that his yacht was out of commission during the year preceding the first of September, 1909; was laid up during that year, and was not actually used by any person.

The statute seems to distinguish between use and ownership. It imposes a novel tax—a tax on use. There is nothing by way of precedent to aid in the determination whether Congress intended that the statute should apply only in cases where owners use their yachts for yachting purposes during the year prior to the assessment of the tax, or whether it intended that the tax should cover the privilege of using. Considering the object of the statute and
34 the reason of the matter, I think the latter interpretation the correct one, although I fully appreciate the very narrow distinction between such a tax on the privilege of using and a tax on ownership. Still, I can see no reason why Congress should distinguish between the yacht owner who chooses to put his yacht in commission and employ it as a pleasure craft, and the owner who prefers in a particular year to keep his yacht laid up. The latter has in one sense the use of his yacht, although he does not cho-se to sail it. I have already held that use by the owner for any particular length of time is not necessary to the application of the statute, and I now feel constrained to further hold that no particular kind of use is required—that a yacht owner who keeps his yacht laid up is nevertheless liable to the tax.

The final question to which it is necessary to give any extended consideration is whether the owner of a foreign-built yacht can acquire any immunity under a treaty which will exempt him from the operation of this statute.

The defendant Rainey contends that as the treaty of 1815 with Great Britain provided that no higher or other duties or charges should be imposed in the United States upon British vessels than those imposed upon vessels of the United States he—as the owner of a British-built vessel—is not subject to the statute.

This defendant does not claim to be a British subject, and it is by no means clear that he is entitled to invoke the protection
35 of the treaty. But, however that may be, it is well settled that when a treaty is inconsistent with a subsequent Act of Congress, the latter will prevail. Taylor et al. v. Morton, 2 Curtis 454; and see Whitney v. Robertson, 124 U. S. 190; Head Money Cases, 112 U. S. 580; The Cherokee Tobacco, 11 Wall. 616; Ropes v. Clinch, 8 Blatchf. 304.

Treaties are contracts between nations and by the Constitution are made the law of the land. But the Constitution does not declare that the law so established shall never be altered or repealed by Congress. Good faith toward the other contracting nation might require Congress to refrain from making any change, but if it does act, its enactment becomes the controlling law in this country. The other nation may have ground for complaint, but every person is bound to obey the law. And as a corollary it follows that no person acquires any vested right to the continued operation of a treaty.

It is now only necessary to briefly state the conclusions reached with respect to the less important questions considered upon the various briefs.

(1) I am satisfied that an action in the nature of debt will lie against the yacht owners to enforce the collection of the tax, and that the complaints state good causes of action.*

36 (2) I am also satisfied that the section in question is not void as a bill for raising revenue originating in the Senate and not in the House of Representatives. It appears that the section was proposed by the Senate as an amendment to a bill for raising revenue which originated in the House. That is sufficient. Having become an enrolled and duly authenticated Act of Congress, it is not for this Court to determine whether the amendment was or was not outside the purposes of the original bill.

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*The defendants in these cases are liable as owners of the yachts. Why they should be described in the complaints as "managing owners" is not apparent. The only reference to managing owners in the statute seems to be for the purpose of fixing the jurisdiction of the collector of customs in cases where there are several part owners. Still, a sole owner is undoubtedly the managing owner of his yacht and there is no contention but that these defendants are the sole owners of their yachts. Consequently I think the presence of the word "managing" should not be held to affect the sufficiency of the complaint.

For the reasons stated, the demurrers of the Government to the answers in the Billings, Pierce and Rainey cases are sustained. The demurrers in the Bennett and Goelet cases are overruled.

(Endorsed:) U. S. Circuit Court, Southern District N. Y., Filed Mar. 8, 1911, John A. Shields, Clerk.

37 *Order Sustaining Demurrer.*

At a Stated Term of the United States Circuit Court for the Southern District of New York, Held in the United States Court House and Post Office Building in the Borough of Manhattan, City of New York, on the 16th Day of March, 1911.

Present: Hon. Walter C. Noyes, Judge.

UNITED STATES OF AMERICA, Plaintiff,
vs.
H. CLAY PIERCE, Defendant.

The issues of law raised by the demurrer of the plaintiff to the second amended answer of the defendant herein, having come on to be heard by this Court at a Stated Term thereof, held in the United States Post Office and Court House Building in the Borough of Manhattan, City of New York, on the 10th day of February, 1911.

Now, after hearing Addison S. Pratt, Esq., Assistant United States Attorney, of counsel for the plaintiff, in support of the said demurrer, and William D. Guthrie, Esq., of counsel for the defendant in opposition thereto, and due deliberation having been had thereon, it is upon motion of Henry A. Wise, United States Attorney for the Southern District of New York, attorney for the plaintiff.

Ordered that the demurrer of the plaintiff to the Second amended answer herein be and the same hereby is sustained and that the plaintiff have final judgment against the defendant for the relief demanded in the amended complaint herein, together with its
38 costs to be taxed by the Clerk of this Court.

WALTER C. NOYES,
U. S. Circuit Judge.

(Endorsed:) Copy Received Mar. 14, 1911. Guthrie, Bangs & Van Sinderen. U. S. Circuit Court, Southern District, N. Y. Filed Mar. 16, 1911. John A. Shields, Clerk.

39 *Order Denying Application for Interest.*

At a Stated Term of the United States Circuit Court, Held in and for the Southern District of New York, at the United States Court and Post Office Building, Borough of Manhattan, City of New York, on the 7th Day of July, 1911.

Present: Hon. Walter C. Noyes, Judge.

UNITED STATES OF AMERICA, Plaintiff,
vs.
H. CLAY PIERCE, Defendant.

An application having heretofore been made to this Court by the plaintiff above named for the allowance of interest from the first day of September, 1909, on the amount of the tonnage tax sued for herein, as demanded in the complaint, and opposition thereto having been made by the defendant,

Now after hearing Addison S. Pratt, Esq., Assistant United States Attorney for the Southern District of New York, of counsel for the plaintiff, in support thereof, and Francis S. Banks, Esq., of counsel for the defendant, in opposition thereto, and due deliberation having been had thereon, on motion of Guthrie, Bangs & Van Sinderen, attorneys for the defendant, it is

Ordered that the application of the plaintiff that it be allowed interest on the amount of the tonnage tax sued for herein be, and it hereby is denied.

WALTER C. NOYES,
United States Circuit Judge.

(Endorsed:) U. S. Circuit Court, Southern District, N. Y. Filed Jul- 13, 1911. John A. Shields, Clerk.

40 *Judgment.*

United States Circuit Court, Southern District of New York.

UNITED STATES OF AMERICA, Plaintiff,
vs.
H. CLAY PIERCE, Defendant.

The issues of law raised by the demurrer of the plaintiff to the second amended answer of the defendant herein having duly come on to be heard by this Court at a Stated Term thereof held at the United States Court House and Post-Office Building, in the Borough of Manhattan, City of New York, on the 10th day of February, 1911, and an order having been entered herein sustaining the said demurrer and directing that the plaintiff have final judgment against the defendant for the relief demanded in the amended complaint herein with costs,

Now on motion of Henry A. Wise, United States Attorney for the Southern District of New York, attorney for the plaintiff, it is

Ordered and adjudged that the plaintiff recover against
41 the defendant the sum of $3,682, without interest, together with its costs and disbursements to be taxed by the Clerk of this Court, and amounting as taxed to the sum of $53.87, and amounting in all to the sum of $3,735.87, and that the plaintiff have execution therefor.

Dated New York, July 13th, 1911.

Judgment signed this 13th day of July, 1911.

JOHN A. SHIELDS, *Clerk.*

(Endorsed:) U. S. Circuit Court, Southern District, N. Y. Filed Jul- 13, 1911. John A. Shields, Clerk.

42 Circuit Court of the United States, Southern District of New York.

UNITED STATES OF AMERICA, Plaintiff,
against
H. CLAY PIERCE, Defendant.

Assignment of Errors.

The defendant in this action, in connection with his petition for a writ of error, assigns for error the following:

First. The court erred in sustaining the demurrer of the plaintiff to the defendant's second amended answer and in entering judgment accordingly.

Second. The court erred in ruling that the defendant's yacht was subject to the tax laid under section 37 of the Act of August 5, 1909 (c. 6, 39 Stat. 11).

Third. The court erred in holding that the defendant's yacht was subject to the said tax without proof that there had been any use of said yacht in or during the year preceding September 1, 1909.

Fourth. The court erred in holding that the first levy of the tax under the said Act should be as of the 1st day of September, 1909, and in refusing to hold that the first levy of the tax under the said Act should be as of the 1st day of September, 1910.

Fifth. The court erred in holding that although the said tax is an annual tax on use it should not be apportioned so as to tax only
use after the enactment of the statute.
43 Sixth. The court erred in holding that the said Act did not conflict with the requirement of due process of law contained in the Fifth Amendment to the Constitution of the United States.

Wherefore, the defendant prays that the judgment of the said Circuit Court be reversed.

GUTHRIE, BANGS & VAN SINDEREN,
Attorneys for Defendant.

Office and Post Office Address, 44 Wall Street, Borough of Manhattan, City of New York.

A copy of the within paper has been this day received at this office. Jul- 13, 1911. Henry A. Wise, U. S. Attorney. U. S. Circuit Court, Southern District, N. Y. Filed Jul- 13, 1911. John A. Shields, Clerk.

44 *Bond.*

United States Circuit Court, Southern District of New York.

Action No. 1.

UNITED STATES OF AMERICA, Plaintiff,
against
H. CLAY PIERCE, Defendant.

Know all men by these presents:

That the Fidelity and Deposit Company of Maryland, a surety corporation duly authorized to transact business under the Act of Congress approved August 13th, 1894, and having an office at No. 2 Rector Street, in the Borough of Manhattan, City of New York, is held and firmly bound unto the United States of America in the sum of four thousand dollars ($4000.00), lawful money of the United States, to be paid to the said United States of America; for which payment, well and truly to be made, the said Fidelity and Deposit Company of Maryland binds itself, its successors and assigns, firmly by these presents.

Sealed with its corporate seal. Dated this thirteenth day of July, Nineteen hundred and eleven.

Whereas, lately at a Circuit Court of the United States for the Southern District of New York, in a suit depending in said Court between the Complainant and Defendant hereinabove named, a final judgment was rendered against the said H. Clay Pierce, and the said H. Clay Pierce having obtained a writ of error and filed a copy thereof in the Clerk's office of the said Court, to reverse the final judgment in the aforesaid suit, and a citation directed to the said United States of America, citing and admonishing it to be and appear at a session of the Supreme Court of the United States
45 to be holden at the City of Washington.

Now, the condition of the above obligation is such, that if the said H. Clay Pierce shall prosecute his said appeal to effect, and answer all damages and costs if he fail to make said plea good, then the above obligation to be void; otherwise to remain in full force and effect.

[SEAL.] FIDELITY AND DEPOSIT COMPANY
OF MARYLAND,
By CHARLES V. R. MARSH,
Attorney-in-Fact.

Attest:

JAMES R. KINGSLEY, *Attorney.*

(Statement of Surety Company attached.)

(Endorsed:) Approved as to form and also as to sufficiency of sureties, with reservation, however, to the defendant in error, of the right at any time to examine the proper officers of the Surety Company, under oath, touching its assets, liabilities and financial condition generally.

WALTER C. NOYES,
U. S. Circuit Judge.

U. S. Circuit Court, Southern District, N. Y. Filed Jul- 13, 1911. John A. Shields, Clerk.

46 THE UNITED STATES OF AMERICA, ss:

To the United States of America, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, to be holden at the City of Washington, on the 12th day of August, 1911 next, pursuant to a writ of error filed in the Clerk's office of the Circuit Court of the United States for the Southern District of New York, wherein H. Clay Pierce is the plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and speedy justice be done to the parties in that behalf.

Given under my hand at the Borough of Manhattan, in the City of New York, in the District and Circuit above named, this 13th day of July, in the year of our Lord one thousand nine hundred and eleven, and of the Independence of the United States the one hundred and thirty-sixth.

WALTER C. NOYES,
Judge of the Circuit Court of the United States for the Southern District of New York.

47 [Endorsed:] Law. 4/162. E. & A. D. 3264. Supreme Court of the U. S. H. Clay Pierce, Plaintiff in Error, against United States of America, Defendant in Error. Citation. William D. Guthrie, Attorney for Plaintiff in Error, 44 Wall Street, New York City. A copy of the within paper has been this day received at this office. Jul- 13, 1911. Henry A. Wise, U. S. Attorney. U. S. Circuit Court, Southern District, N. Y. Filed Jul- 13, 1911. John A. Shields, Clerk.

[Endorsed:] United States Supreme Court. H. Clay Pierce, Plaintiff in Error, vs. United States of America, Defendant in Error. Transcript of Record.

Endorsed on cover: File No. 22,813. S. New York C. C. U. S. Term No. 64. H. Clay Pierce, plaintiff in error, vs. The United States. Filed July 25th, 1911. File No. 22,813.

(22,814)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1913.

No. 65.

H. CLAY PIERCE, PLAINTIFF IN ERROR,

vs.

THE UNITED STATES.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

INDEX.

	Original.	Print
Petition for writ of error	1	1
Order allowing writ	2	1
Writ of error	3	2
Clerk's certificate	4	2
Summons	6	3
Complaint	7	4
Answer	12	6
Stipulation waiving jury trial	16	8
Opinion, Hough, D. J	17	8
Findings of fact and conclusions of law	31	17
Defendant's exceptions	36	20
Judgment	37	20
Bill of exceptions	39	22
Offers by the Government	39	22
Government's Exhibit 1—Bill of sale	41	23
Motion to dismiss denied	45	25
Testimony of Willett L. Wagner for defendant	45	25
Stipulation as to facts	47	26
Motion to dismiss renewed, &c	48	27
Judge's certificate to bill of exceptions	49	27
Assignment of errors	51	28
Bond	53	28
Citation	55	29

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JULY 8, 1913.

1 Circuit Court of the United States for the Southern District of New York.

At Law. Action No. 2.

UNITED STATES OF AMERICA, Plaintiff,
against
H. CLAY PIERCE, Defendant.

Petition for Writ of Error.

And now comes H. Clay Pierce, defendant herein, and says: That on or about the — day of —— 1911, the Circuit Court of the United States for the Southern District of New York entered a judgment herein in favor of the plaintiff and against this defendant, in which judgment and the proceedings had prior thereto in this cause, certain errors were committed to the prejudice of this defendant, all of which will more in detail appear from the assignment of errors which is filed with this petition.

Wherefore, this defendant prays that a writ of error may issue in this behalf out of the Supreme Court of the United States for the correction of errors so complained of, and that a transcript of the record, proceedings and papers in this cause, duly authenticated, may be sent to the Supreme Court of the United States.

WILLIAM D. GUTHRIE,
Attorney for Defendant, 44 Wall Street,
New York City, N. Y.

2 *Order Allowing Writ of Error.*

Circuit Court of the United States for the Southern District of New York.

Action No. 2. At Law.

UNITED STATES OF AMERICA, Plaintiff,
against
H. CLAY PIERCE, Defendant.

This 13th day of July, 1911, comes the defendant, by William D. Guthrie his attorney, and files herein and presents to the court his petition praying for the allowance of a writ of error, and assignment of errors intended to be urged by him, praying also that a transcript of the record and proceedings and papers upon which the judgment herein was rendered, duly authenticated, may be sent to the Supreme Court of the United States, and that such other and further proceedings may be had as are proper in the premises.

On consideration whereof the court does allow the writ of error

upon the defendants giving bond according to law in the sum of four thousand dollars ($4,000.00/100) which shall operate as a supersedeas bond.

WALTER C. NOYES,
United States Circuit Judge.

3 *Writ of Error.*

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Judges of the Circuit Court of the United States, for the Southern District of New York, Greeting:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the Circuit Court, before you, or some of you, between the United States of America, plaintiff, and H. Clay Pierce, defendant, a manifest error hath happened, to the great damage of the said H. Clay Pierce as is said and appears by his complaint, we, being willing that such error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of United States, together with this writ, so that you have the same at the City of Washington on the 12th day of August, 1911, in said Supreme Court, to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein, to correct that error, what of right and according to the law and custom of the United States ought to be done.

Witness, the Honorable Edward D. White, Chief Justice of the Supreme Court of the United States, this 13th day of July, in
4 the year of our Lord one thousand nine hundred and eleven, and of the Independence of the United States the one hundred and thirty-sixth.

JOHN A. SHIELDS,
Clerk of the Circuit Court of the United States of America, for the Southern District of New York, in the Second Circuit.

The foregoing writ is hereby allowed.
WALTER C. NOYES,
U. S. Circuit Judge.

Clerk's Certificate.

UNITED STATES OF AMERICA,
Southern District of New York, ss:

I, John A. Shields, Clerk of the Circuit Court of the United States of America, for the Southern District of New York, in the Second Circuit, by virtue of the foregoing Writ of Error, and in obedience

thereto, do hereby certify, that the pages numbered from one to 56 inclusive, contain a true and complete transcript of the record and proceedings had in said Court in the cause of H. Clay Pierce, Plaintiff in Error, vs. United States of America, Defendant in Error, Action No. 2, as the same remain of record and on file in said office.

In testimony whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, in the Second Circuit, this 20th day of July, in the year of our Lord one thousand nine hundred and eleven, and of the Independence of the United States the one hundred and thirty-sixth.

[Seal Circuit Court, South. Dis. New York.]

JOHN A. SHIELDS, *Clerk.*

5 [Endorsed:] Law 6/106. Supreme Court of the United States. H. Clay Pierce, Plaintiff-in-error, against United States of America, Defendant-in-error. Action No. 2. E. & A. D. 3265. Writ of error. William D. Guthrie, Att'y for Plaintiff-in-error, 44 Wall Street, New York. A copy of the within paper has been this day received at this office. Jul- 13, 1911. Henry A. Wise, U. S. Attorney. U. S. Circuit Court, Southern District, N. Y. Filed Jul- 13, 1911. John A. Shields, Clerk.

6 *Summons.*

United States Circuit Court, Southern District of New York.

Action No. 2.

UNITED STATES OF AMERICA, Plaintiff,
against
H. CLAY PIERCE, Defendant.

To the Above-named Defendant:

You are hereby summoned to answer the complaint in this action and to serve a copy of your answer on the plaintiff's attorney within twenty days after the service of this summons, exclusive of the day of service; and in case of your failure to appear, or answer, judgment will be taken against you by default for the relief demanded in the complaint.

Witness, the Honorable Edward D. White, Chief Justice of the United States, at the Borough of Manhattan in the City of New York, this 11th day of January, in the year one thousand nine hundred and eleven.

[L. S.] JOHN A. SHIELDS, *Clerk.*

HENRY A. WISE,
U. S. Attorney, Plaintiff's Attorney.

Office and Post-office address, Room 50, U. S. Court and P. O. Building, Borough of Manhattan, New York City.

7 United States Circuit Court, Southern District of New York.

Action No. 2.

UNITED STATES OF AMERICA
vs.
H. CLAY PIERCE.

Complaint.

The plaintiff above named, by Henry A. Wise, United States Attorney for the Southern District of New York, its attorney, for its complaint against the defendant above named, alleges, on information and belief, as follows:

First. That the plaintiff is a corporation sovereign.

Second. That the defendant is a citizen of the United States.

Third. That on the 1st day of September, 1910, the defendant was the managing owner of the yacht "Yacona"; that the said yacht was, and is, a foreign built vessel, and that it was built in the Kingdom of Great Britain; that the said yacht had a gross tonnage of 526.14 tons; that the said yacht had not been, and was not, used or intended to be used for trade.

Fourth. That during all the times herein mentioned the following Customs regulation, duly promulgated and adopted according to law by the Secretary of the Treasury of the United States, was in full force and effect:

ART. 62. "Any foreign-built vessel purchased by a citizen, although prohibited from being documented, is nevertheless entitled to legal protection as property of a citizen.

8 The Collector may issue to any such vessel, owned by a citizen, a certificate in proper form of the validity and filing of the bill of sale. * * *"

Fifth. That the ownership of said yacht "Yacona" was transferred to defendant on or about the 6th day of June, 1902, as evidenced by a bill of sale bearing the same date; that said bill of sale was duly recorded in the office of the Collector of the Port of Boston, in the State of Massachusetts, on the 1st day of July, 1902, and that thereafter on the 3rd day of July, 1902, a certificate was issued to defendant, a copy of which is hereto annexed marked "Schedule A" (said certificate erroneously bearing date of June 3, 1902, instead of the 3rd day of July, 1902, as herein alleged).

Sixth. That during all the times herein mentioned said certificate continued in full force and effect and the protection, privileges, immunities and advantages thereby conferred continued to be used and enjoyed by said defendant.

Seventh. That immediately upon the acquisition of said yacht by the said defendant as aforesaid, the defendant became entitled to and continuously thereafter did exercise the privilege of flying the American flag on said yacht "Yacona."

Eighth. That on or about the 1st day of September, 1910, the

Collector of Customs at the Port of New York, that being the District nearest the residence of the defendant, fixed and deter-
9 mined the sum of Three thousand six hundred and eighty-two dollars ($3,682) as the sum equivalent to the tonnage tax of seven dollars ($7) per gross ton upon the use of the said yacht, and thereby levied a tonnage tax in said amount upon the use of the same.

Ninth. That the said Collector of Customs at the Port of New York gave notice to the defendant of the levy of the said tax, and demanded payment thereof on the 1st day of September, 1910, prior to the beginning of this action, but no part thereof has been paid, and the defendant has not paid a duty of thirty-five per cent. (35%) ad valorem upon the said yacht, in lieu of the said tax.

Wherefore, plaintiff demands judgment against the defendant for the sum of Three thousand six hundred and eighty-two dollars ($3,682), with interest thereon from the first day of September, 1910, together with the costs and disbursements of this action.

HENRY A. WISE,
United States Attorney for the Southern District of New York, Attorney for the Plaintiff.

Office and Post Office Address, Room 50, U. S. Court House and Post Office Building, Borough of Manhattan, City of New York, N. Y.

10 *Schedule A.*

I, William F. Jones, Deputy Collector of Customs at the Port of Boston, District of Boston and Charlestown, do hereby certify that the within Bill of Sale of the Steam yacht Yacona, dated June 6, 1902, Gross tonnage 527.35 tons, Net tonnage 169.63 tons (British measurement) transferring said yacht from Gustavus Pratt to Henry Clay Pierce of New York, has been duly recorded at this office and that it appears to be a valid conveyance, and that said Henry Clay Pierce is a citizen of the United States.

Witness my hand and seal this 3rd day of June in the year of our Lord 1902.

[Seal of United States.]

(S'g'd) WM. F. JONES,
Deputy Collector.

11 STATE OF NEW YORK,
County of New York,
Southern District of New York, ss:

Addison S. Pratt, being duly sworn, deposes and says that he is an assistant to the United States Attorney for the Southern District of New York, the attorney for the plaintiff in the within entitled action; that he has read the foregoing complaint and knows the contents thereof; that the same is true of his own knowledge, except as to the matters therein stated to be alleged on information and belief and that as to those matters he believes it to be true. That the

reason why this verification is made by deponent and not by plaintiff is that plaintiff is a corporation sovereign.

That the sources of deponent's information and the grounds of his belief as to all the matters set forth in said complaint not stated upon his knowledge, are derived from communications received by him from the Collector of Customs at the Port of New York.

ADDISON S. PRATT.

Sworn to before me this 10th day of January, 1911.

[SEAL.] GEORGE J. ZENGERLE,
Notary Public, Queens Co.

Cert. #2025 filed in N. Y. Co.

(Endorsed:) U. S. Circuit Court, Southern District N. Y., Filed Jan. 12, 1911, John A. Shields, Clerk.

12 *Answer.*

United States Circuit Court, Southern District of New York.

Action No. 2.

UNITED STATES OF AMERICA, Plaintiff,
against
H. CLAY PIERCE, Defendant.

And now comes the defendant above-named, by Guthrie, Bangs and Van Sinderen, his attorneys, and as and for his answer to the complaint of the plaintiff, United States of America:

For a First Defense.

I. Admits that the Customs regulation alleged and quoted in paragraph "Fourth" of the complaint has been promulgated and adopted by the Secretary of the Treasury, but denies that said regulation was duly promulgated according to any Act of Congress.

II. Denies that any certificate was issued to the defendant as alleged in paragraph "Fifth" of the complaint, but admits and alleges that the substance of the form annexed to the complaint was endorsed on the original bill of sale referred to in said paragraph "Fifth."

III. Denies each and every allegation contained in paragraph "Sixth" of the complaint.

IV. Alleges on information and belief, that the said yacht "Yacona" has not at any time been, and is not now, registered, enrolled or documented as a vessel of the United States, and is
13 not entitled to enjoy or exercise, and has never enjoyed or exercised any rights, privileges or protection as a vessel or yacht of the United States.

For a Second and Separate Defense.

V. Alleges that the said yacht "Yacona" was not in use by the defendant or by any other person at any time during the year next preceding the first day of September 1910, but was out of commission and laid up unused, at Brooklyn in the State of New York throughout the whole of such year.

For a Third and Separate Defense.

VI. Alleges on information and belief that at the time of the passing and approval of the Act of Congress entitled "An Act to provide revenue, equalize duties and encourage the industries of the United States" approved August 5, 1909, and of the alleged levy of said annual tax upon the use of this defendant's said yacht, pursuant to Section 37 of said Act, there were and ever since have been in the United States, and within its jurisdiction, a large number of yachts, pleasure-boats and vessels not used or intended to be used for trade, and not foreign-built, which were then owned or chartered for more than six months by citizens of the United States, and which were and are similar to this defendant's said yacht in all substantial respects as to construction, character and nature of property, and identical with this defendant's said yacht in all respects as to use and as being personal property of citizens of the United States, but upon the use of which property so similarly situated no tax is imposed by the said Act of Congress; that said Act of Congress, in so far as it purports in and by Section 37 thereof to direct the
14 levy and collection of a tax upon the use of this defendant's said yacht, is not a general law operating upon all citizens of the United States owning and using like property under substantially similar conditions and circumstances, and that the levy and collection from this defendant of said sum, equivalent to a tonnage tax of seven dollars per gross ton, would not constitute the levy and collection of any tax, duty, impost or excise within the true meaning of the Constitution of the United States, but would deprive this defendant of his property without due process of law, in conflict with the Fifth Article of Amendment to the Constitution of the United States.

Wherefore the defendant prays that the complaint of the United States of America in the above-entitled action be dismissed with costs.

GUTHRIE, BANGS & VAN SINDEREN,
Attorneys for the Defendant.

Office and Post Office Address, 44 Wall Street, Borough of Manhattan, New York City.

UNITED STATES OF AMERICA,
Southern District of New York, ss:

H. Clay Pierce, being duly sworn, says: that he is the defendant above named; that the foregoing answer is true to the knowledge of deponent, except as to the matters therein stated to be alleged on

information and belief, and that as to those matters he believes it to be true.

H. C. PIERCE.

Sworn to before me this 18th day of February 1911.
[SEAL.] JESSE MYERS,
Notary Public, N. Y. Co.

15 A copy of the within paper has been this day received at this office. Feb. 1, 1911. Henry A. Wise, U. S. Att'y.—U. S. Circuit Court, Southern District N. Y., Filed Feb. 2, 1911, John A. Shields, Clerk.

16 *Stipulation Waiving Jury.*

United States Circuit Court, Southern District of New York.

UNITED STATES OF AMERICA, Plaintiff,
against
HENRY CLAY PIERCE, Defendant.

It is hereby stipulated and agreed by and between the attorneys for the respective parties hereto that this action be tried by the Court without a jury, a jury being hereby expressly waived. Dated: New York April 10, 1911.

HENRY A. WISE, *Attorney for Plaintiff.*
GUTHRIE, BANGS & VAN SINDEREN,
Attorneys for Defendant.

(Endorsed:) U. S. Circuit Court, Southern District N. Y., Filed Jul- 13, 1911, John A. Shields, Clerk.

17 Circuit Court of the United States, Southern District of New York.

No. 2.

UNITED STATES OF AMERICA,
vs.
CORNELIUS K. G. BILLINGS.

No. 2.

SAME
vs.
H. CLAY PIERCE.

No. 2.

SAME
vs.
ROY A. RAINEY.

No. 2.

SAME
VS.
JAMES GORDON BENNETT.

No. 2.

SAME
VS.
HARRIET GOELET.

SAME
VS.
C. LEDYARD BLAIR.

SAME
VS.
INVESTORS' & TRADERS' REALTY CO.

Yacht Cases.

Opinion by Hough, J.

Actions at law tried (by consent) without a jury—and
18 each brought to recover one year's tonnage tax under Section 37 of the Tariff Act of 1909, defendants being severally the owners of yachts admitted or alleged to be "foreign-built."

Mr. Pratt, Assistant U. S. Attorney, for plaintiff;
Mr. Bangs for defendants Billings, Bennett, Goelet and Pierce;
Mr. Andrade for defendant Rainey;
Mr. Byrne for defendant Blair;
Mr. Miller for defendant Investors' & Traders' Realty Co.

Findings of Fact.

(Billings Case.) Defendant is a citizen of the United States and was on September 1, 1910, the owner and managing owner of the yacht Vanadis, a foreign-built vessel of a gross tonnage of 1091.79 tons. That on or about the date last mentioned the Collector of Customs at the Port of New York levied a tax, pursuant to the act above referred to, of $7 per gross ton upon the use of the said yacht. The amount of the tax so levied and determined is $7,644. Mr. Billings is not only a citizen, but a resident of the United States and has his domicile in this country. Neither in 1909 nor 1910 did he actually use Vanadis in the sense of having her in commission for as much as six months; while in the sense that he did use her, such use was partly within and partly without the territorial jurisdiction of the United States, but when not in commission the vessel laid up in this country.

At the time of the passing of the act in question there were and ever since have been in the United States and within its jurisdiction a large number of yachts, pleasure-boats and vessels not used or intended to be used for trade and not foreign-built, which were then owned or chartered for more than six months by citizens of the United States and which were and are similar to this defendant's yacht in all substantial respects as to construction, character
19 and nature of property and identical with said defendant's yacht in all respects as to use and as being personal property of citizens of the United States.

The Vanadis was transferred to defendant on or about May 29, 1909, and her bill of sale was recorded in the office of the Collector of the Port of New York, who levied the tax in suit and whose district is nearest defendant's place of residence.

(Pierce Case.) Defendant is a citizen of the United States and domiciled and resident therein. On September 1, 1910, he was the owner and managing owner of the yacht Yacona, a foreign-built vessel of a gross tonnage of 526.14 tons. On or about said last mentioned date the Collector of Customs at the Port of New York levied a tax pursuant to the statute above mentioned at the rate of $7 per gross ton upon the use of said yacht, the amount of said tax being $3,682. The yacht in question was transferred to defendant on or about June 6, 1902, and her bill of sale was recorded in the office of the Collector of the Port of Boston. The Collector of the Port of New York is the Collector of the District nearest the residence of the defendant. At the time of the levying of the said tax and for a long time before, i. e., more than a year before, the Yacona was out of commission and laid up at Brooklyn, N. Y., and was not used in the sense of being navigated or put to purposes of pleasure, by the defendant or anyone else, but the defendant could have used her if he had so desired.

The finding as to the existence and non-taxation of a large number of non-foreign-built yachts in the United States hereinabove made in the Billings case is repeated and found in this case.

(Bennet Case.) The defendant is a citizen of the United States, domiciled and resident in the Republic of France. On or about September 1, 1910, he was the owner and managing owner of the yacht Lysistrata, a foreign-built vessel of the gross tonnage of 1942.75 tons. On or about September 1, 1910, the Collector of Customs of the Port of New York levied a tax pursuant to the statute above mentioned at the rate of $7 per ton upon the use of said
20 yacht, and the amount of said tax was and is $13,601. Said Collector of Customs was not the Collector of the District nearest the residence of the defendant. Said yacht Lysistrata has never at any time been within the territorial jurisdiction of the United States except for brief visits of a few days, and her headquarters, usual anchorage or mooring place when not engaged on voyages is not and never has been within the waters of the United States. The same finding as to the existence and non-taxation of other yachts not foreign-built and owned or chartered by citizens of the United

States as has been hereinabove made in the Billings case is made in this case.

(Goelet Case.) Defendant is a citizen of the United States, domiciled and resident in the Republic of France. On or about the first day of September, 1910, she was the owner and managing owner of the yacht Nahma, a foreign-built vessel of the gross tonnage of 1739.83 tons. On or about September 1st, 1910, the Collector of Customs at the Port of New York levied a tax pursuant to the statute above mentioned at the rate of $7 per ton upon the use — said yacht, and the amount of said tax was and is $12,180. Said Collector of Customs was not the Collector of the District nearest the residence of the defendant.

Said yacht Nahma was originally purchased on or about November 30, 1896, by Robert Goelet, deceased (a citizen of the United States), and her bill of sale was recorded in the office of the Collector of Customs of the Port of New York. Upon the decease of Mr. Goelet his executors conveyed the said yacht to defendant by a bill of sale which was likewise recorded in the office of said Collector of Customs. The Nahma has not been in the territorial jurisdiction of the United States since 1901, and when not in commission she has laid up at Greenock, Scotland. The finding as to the existence and non-taxation of a large number of foreign-built yachts in the United States hereinabove made in the Billings case is repeated and found in this case.

(Rainey Case.) Defendant is a citizen of the United States
21 domiciled and resident therein. On September 1, 1910, he was the owner and managing owner of the yacht Cassandra, a foreign-built vessel of a gross tonnage of 1227.17 tons. On or about said last mentioned date the Collector of Customs at the Port of New York levied a tax pursuant to the statute above mentioned at the rate of $7 per gross ton upon the use of said yacht, the amount of said tax being $8,589. The yacht in question was transferred to the defendant on or about the 25th of June, 1908, and her bill of sale was recorded in the office of the Collector of the Port of New York. The Collector of the Port of New York is the Collector of the District nearest the residence of the defendant. At the time of the levying of the said tax and for a long time before, i. e., more than a year before, the Cassandra was out of commission and laid up at New London, Conn., and there is no evidence that during that time or at any time since was the vessel navigated or put to purposes of pleasure by the defendant or any one else, but defendant could have used her if he had so desired.

The findings as to the existence and non-taxation of a large number of foreign-built yachts in the United States hereinabove found in the Billings case is repeated and found in this case.

(Blair Case.) Defendant is a citizen of the United States and domiciled and resident therein. On September 1, 1909, he was the owner and managing owner of the yacht Diana, a vessel of a gross tonnage of 785.6 tons. On or about said last mentioned date the Collector of Customs at the Port of New York assumed to levy a tax alleged to be pursuant to the statute above mentioned at the rate of

$7 per gross ton upon the use of the said yacht, the amount of said tax being $5,502.

The yacht Maria was built in Glasgow, Scotland, in 1896; in 1902 she was sold to an American citizen, who re-named her the Delaware; he used her as a pleasure vessel until 1905. During Mr.
Bourne's ownership of her approximately $30,000 was spent
22 in improving and bettering the Delaware, said expenditures being exclusive of those payments properly chargeable to maintenance or upkeep. In February, 1905, while lying at Hoboken, N. J., the Delaware was burned, most of her upper works being totally destroyed, her engines so injured that they had to be dismantled, and her steel plating badly warped. So much water was pumped into her to put out the fire that she sank, though apparently there was not enough water at her berth to permit her to go out of sight. The wreck passed into the hands of Mr. Chubb, apparently as agent for underwriters. That gentleman raised and rebuilt the yacht at an expense of approximately $86,000, and he renamed the re-built vessel Diana. In 1906 Mr. Chubb sold the Diana to the defendant, and between the date of his purchase and the date of levying the tax Mr. Blair has expended on the Diana for betterments and improvements approximately $34,000. Exclusive of salvage, the actual expenditures for rebuilding of and improvements upon the wrecked Delaware amount to approximately $121,000, and Mr. Chubb paid for the wreck $35,500 after, as above noted, Mr. Bourne had expended for new construction on the Delaware, about $30,000.

At the time of the action aforesaid by the Collector of the Port of New York the defendant was a resident of Peapack, N. J., and there had his domicile, being also a citizen of the State of New Jersey. The Collector of the Port of New York is not the collector of the District nearest the residence of the defendant. The bill of sale from Mr. Chubb to defendant was recorded in the office of the Collector for the Port of New York. Defendant has largely used the Diana within the territorial jurisdiction of the United States as well as in foreign waters. The finding as to the existence and non-taxation of a large number of non-foreign built yachts in the United States hereinabove made in the Billings case is repeated and found in this case.

(Investors' & Traders' Realty Co. Case.) Defendant is a
23 citizen of the United States and is a corporation whose "residence" is nearest the collection district in charge of the Collector of the Port of New York.

On September 1, 1909, it was the owner and managing owner of the yacht Allita, a vessel of unknown gross tonnage. On or about the said last mentioned date said Collector of Customs at the Port of New York levied a tax pursuant to the statute above mentioned at the rate of $7 per gross ton upon the use of said yacht, the amount of said tax being $504.

The Allita was originally the Gadabout of 71.86 tons, built at Montreal, Canada. As the Algonquin she passed into the possession of J. H. Flagler in 1900. It does not appear that at the time of her transfer to Flagler she had been injured or received substantial

changes in structure. Having paid $10,000 for the Algonquin, Mr. Flagler lengthened her by inserting approximately 26 feet amidships. He also changed the shape of the stern and rebuilt the bow. The vessel had auxiliary steam, and as lengthened and enlarged the old engine, boilers and wheel were not suitable and were not used. The old boilers and engine were traded for new ones, and including the difference paid for the new propulsive power Mr. Flagler expended upward of $46,000 in changing the Algonquin, which he then renamed the Allita. In 1908 he transferred her (in the process of a real estate transaction) to the defendant Company, which has never used her as a yacht and evidently accepted the vessel only to sell again. The bill of sale from Flagler to defendant was recorded in the Collector's office of the Port of New York July 7, 1909.

The same finding as to the existence and non-taxation of other yachts nor foreign-built and owned or chartered by citizens of the United States as has been hereinabove made in the Billings case is made in this case.

24 *Memorandum.*

The foregoing findings of fact are not intended to be exhaustive; they do not assume to do more than state what appear to me to be the material facts necessary for understanding the opinion of Noyes, J., filed in several of these cases March 8, 1911, as well as the decision about to be made on points not then argued.

If the District Attorney considers a formal finding to the effect that each of these yachts has at some time displayed either the national flag or the yacht ensign it will be made.

Of Customs regulations I think any Federal Court may take notice without finding.

As to all the constitutional points argued, no opinion is expressed other than to say that I follow the decision of Noyes, J., above noted. The same is true of the questions of interpretation passed upon in said opinion, and it is therefore held that the tax is not collectible against those owners domiciled and resident abroad. Also that the tax, being upon the use of a yacht, applies to potential use, and finally that the congressional intent being clear it is not a valid objection to the tax that it is inconsistent (if it is) with our treaty with Great Britain of 1815.

The actions against Blair and the Investors' & Traders Realty Company raise a point not previously discussed, viz: what is meant by a foreign-built yacht.

The Blair case also requires answer to the question, What is the force and effect of the statutory words that the tax "shall be levied and collected * * * by the Collector of Customs of the District nearest the residence of the managing owner?"

The suit against the Investors' & Traders' Company also suggests (though it was not argued) the inquiry as to how the gross tonnage by which the tax is measured is to be ascertained. Before taking up these considerations it is noted that I have found as matter of

fact that Mrs. Goelet and Mr. Bennett are both resident and
25 domiciled abroad. It is believed that although many cases, of which De Meli vs. De Meli, 120 N. Y., 485, and People vs. Platt, 117 N. Y., 159, are examples, have held these two words synonymous, that they cannot be so considered in this Court. "Domicile" is a larger word than "residence," because the latter is acquired by the former. Although "domicile" in its ordinary acceptation means the place where a person lives and has his home, yet it implies residence plus animus manendi. The Venus, 8 Cranch, 279; Ennis vs. Smith, 14 How., 423; Mitchell vs. United States, 21 Wall., 352; Newton vs. Commissioners, 100 U. S., 562. These decisions are consistent with the language of Corel vs. Railway Co., 123 Fed. Rep., 452, which points out that "residence" is not synonymous with "domicile," for a man may have more than one place of residence, but he can have but one "domicile." And also with Stout vs. Leonard, 8 Vroom, 492, holding that "domicile is residence combined with intention." And the same distinction is maintained in Long vs. Ryan, 30 Gratton, 718, and Bradley vs. Lowry, Speer's Equity (S. C.), 25.

I.

The meaning of the phrase "foreign-built." This may be considered from three points of view:

a. What is its signification in the shipping trade and among those familiar with maritime affairs?

b. What light is cast on the inquiry by general usage as evidenced by lexicographers?

c. Are there any decisions of authority?

(*a*) No expert evidence as to the meaning of the phrase was introduced at the trial, but an investigation of congressional publications shows that it was suggested to Congress by those who petitioned for the legislation which finally became the section now under consideration. It appears from House document 1505, 60th Congress, 2d Session (Tariff Hearing, Vol. 7, p. 7526 et seq.), that a
26 considerable number of ship chandlers, and one ship builder, petitioned for the passage of an act laying an ad valorem duty of 75% on any foreign-built yacht thereafter purchased by any citizen of the United States, and several very instructive reasons were advanced in favor of the proposed law, one of them being that the tariff would not be prohibitive because "a certain proportion of the very rich men of America are apparently determined to possess foreign-built yachts at any price without regard to circumstances." And Congress was furnished with a long list of obnoxious vessels alleged to be foreign-built and American owned, which list is thought to include every yacht now under consideration. It may fairly be presumed that in legislating upon the prayer of any portion of the ship-building community congress used language in the sense in which it was proposed, and it is in my judgment common knowledge that any person using the language of the sea means by a "foreign-built" vessel one originally constructed outside the United

States, no matter how extensive the changes, alterations or repairs bestowed upon her here may have been.

(*b*) Anything which is built is formed "by uniting materials into a regular structure," and that which is re-built is constructed "after having been demolished."

Changing the name of the Algonquin to Allita, or of the Delaware to Diana, effected nothing. Neither of these vessels was strictly speaking even re-built, for neither had been demolished. The Allita was merely enlarged, while the Diana was both repaired and enlarged.

(*c*) It appears to me that the reasoning of United States vs. The Grace Meade, Fed. Cases 15243, is plainly applicable here.

Rev. Stat. Sec. 4179 prohibits changing the name of any "vessel of the United States," i. e., of any vessel lawfully registered, enrolled or licensed pursuant to legislative authority. The object of that statute is plainly to mark and preserve the identity of any named vessel. As long as the vessel is the same the name must be the same unless changed pursuant to other (and here unim-
27 portant) statutes. That decision laid down very clearly the rules by which identity should be determined:

"It may be held as a principle, that, where the keel, stem, and sternposts and ribs of an old vessel, without being broken up and forming an intact frame, are built upon as a skeleton, the case is one of an old vessel rebuilt, and not of a new vessel. Indeed, without regard to the particular parts reused, if any considerable part of the hull and skeleton of an old vessel in its intact condition, without being broken up, is built upon, the law holds that in such a case it is the old vessel rebuilt, and not a new vessel."

The Diana and the Allita in their present condition are either foreign-built or home-built. If they are home-built they must have been constructed when Messrs. Flagler and Chubb respectively expended such extraordinary sums on them. The same vessel can only be built once,—she may be rebuilt many times, but that does not destroy identity under the decision quoted. If they were not new vessels, and new vessels in the technical sense of that word, when they were respectively put into commission after lengthening the Algonquin and after the fire on the Delaware, then they are the same vessels as they were before, however greatly changed in outward appearance, in value or material. If these two yachts had been originally home-built, and that had been done to them which was done, could their respective owners have given new names to them without due application to the Commissioner of Navigation? Plainly not under the language of the decision above quoted. And if the identity of the vessels was not sufficiently destroyed to authorize re-christening, if vessels of the United States, they must remain foreign-built. Even American re-building cannot change that. It is
28 therefore held that both the Allita and the Diana are foreign-built yachts as that phrase is used in the statute under consideration.

II.

The force of the phrase designating the officers by whom the tax "shall be levied and collected."

However shadowy in practice the difference is between a tax upon the potential use of a yacht and the yacht itself,—especially when such tax may be perpetually commuted by the payment of an ad valorem duty,—it is admittedly essential to the Government's position that the taxation be directed against the privilege of use, and therefore accessible to and collectible from the personal user.

It is then highly appropriate that, like almost every other personal tax, the place of taxation shall be the residence of the person taxed, and such is the plain direction of the statute. It is therefore obvious to me that when the act declares that a particular Collector shall levy and collect the tax, it means that he must do something by way of apprising the person who is called upon to pay, of the claim made.

It seems elementary that if one particular officer is charged with the duty, no other officer can lawfully perform that duty.

The word "levy" in law has had many meanings attributed to it (see a collection of them; Words and Phrases, Tit. "Levy"), but nothing suitable to any meaning given was done by the Collector nearest the residence of Mr. Blair. Whatever was done was the act of the corresponding functionary in New York. It is not for the defendant to declare what is necessary; it is enough that the designated official did nothing, so that the Government to prevail in this action must assert (as is done arguendo) that if in any notice of the tax is given to the yacht owner and he does not pay, an action such as this can be maintained. For this claim no basis is perceived.

29

III.

The Measurement of Tonnage.

The complaint against the Investors' & Traders' Company alleges that the Collector of Customs "duly levied upon the use of the said yacht * * * a sum equivalent to a tonnage tax of $7 per ton, to wit $504." This is evidently $7 a ton on the original tonnage of the vessel. It is common knowledge that the result of what was done to the Allita was to increase her tonnage; yet in her last recorded bill of sale she is still described as being of the same tonnage that she was when she was 26 ft. shorter.

The fact appears to be that the tonnage has been taken from her documenting, and the documents not being required by any statute of the United States have been continued without any re-measurement.

This tax is therefore incorrect, but as it is plainly less than the Government would be entitled to demand, the defendant is not in a position to object.

The contentions of several counsel that the tax should be apportioned either in respect of time or in respect of material have not

been overlooked, but of them it is enough to say that any such interpretation of the statute amounts in my judgment to judicial amendment thereof. It may be a very just and *and* desirable amendment, but is, if not wholly beyond the power of any Court, entirely beyond the proper scope of action of a trial court.

Decision.

In United States vs. Billings judgment is directed for the plaintiff;

In United States vs. Pierce judgment is directed for the plaintiff;

30 In United States vs. Rainey judgment is directed for the plaintiff;

In United States vs. Bennett judgment is directed for defendant;

In United States vs. Goelet judgment is directed for defendant;

In United States vs. Blair judgment is directed for defendant;

In United States vs. Investors' & Traders' Realty Company judgment is directed for plaintiff.

5/1/11.

(Endorsed:) U. S. Circuit Court, Southern District N. Y. Filed May 1, 1911. John A. Shields, Clerk.

31 *Findings of Fact and Conclusions of Law.*

United States Circuit Court, Southern District of New York.

Action No. 2.

UNITED STATES OF AMERICA, Plaintiff,
vs.
HENRY CLAY PIERCE, Defendant.

Decision.

The issues of fact raised by the answer of the defendant herein coming on to be tried by this Court at a regular term thereof held by the undersigned without a jury, a jury having been waived by both parties, and having been tried on the 10th and 11th days of April, 1911, and the allegations and evidence of the parties having been heard; now, after hearing Addison S. Pratt, Esq., Assistant United States Attorney for the Southern District of New York, of counsel for the plaintiff, and Francis S. Bangs, Esq., of counsel for the defendant, and due deliberation having been had thereon, I decide and find as follows:—

Findings of Fact.

1. Defendant is a citizen and resident of the United States and has his domicile in the United States. On the 1st day of September,

1910, he was the owner and managing owner of the steam yacht "Yacona."

2. The said steam yacht "Yacona" was built in the Kingdom of Great Britain prior to the year 1902 and its gross tonnage on the 7* 35*
said 1st day of September, 1910 was 526.14 tons. It had not been
and was not on the said 1st day of September, 1910, used
32 or intended to be used for trade.

3. The defendant acquired title to the said steam yacht "Yacona" on the 6th day of June, 1902 by a bill of sale from Gustavus Pratt, of London, England, dated on the said day. The defendant paid for her about $135,000 and he has since said date expended on her in the United States in remodelling, bettering and improving her about $293,000.

4. On the 1st day of July, 1902, the defendant caused the said bill of sale to be recorded in the office of the Collector of Customs of the Port of Boston, and on the 3rd day of July, 1902, the said Collector endorsed on the said bill of sale a certificate in the following form, and thereafter returned the bill of sale to the defendant:—

I, William F. Jones, Deputy Collector of Customs at the Port of Boston, District of Boston and Charlestown, do hereby certify that the within Bill of Sale of the Steam Yacht Yacona, dated June 6, 1902, Gross tonnage 527.35 tons, net tonnage 169.63 tons (British measurement), transferring said yacht from Gustavus Pratt to Henry Clay Pierce of New York has been duly recorded at this office and that it appears to be a valid conveyance, and that said Henry Clay Pierce is a citizen of the United States.

Witness my hand and seal this 3rd day of July, in the year of our Lord 1902.

[SEAL.] WM. F. JONES,
Deputy Collector.

5. On the 13th day of November, 1899, Hon. Lyman J. Gage, Secretary of the Treasury of the United States, established the following regulation for the information and guidance of officers of customs, which regulation continued in full force and effect to the 2nd day of January, 1908.

Art. 62. Any foreign-built vessel purchased by a citizen, although prohibited from being documented, is nevertheless entitled to
33 legal protection as property of a citizen.

The collector may issue to any such vessel, owned by a citizen, a certificate in the prescribed form, of the validity and filing of the bill of sale. A separate record will be kept of these vessels, and in the tonnage returns they will be reported in a separate column, under the head of "Foreign-built or undocumented vessels owned by citizens of the United States".

6. On the 2nd day of January, 1908, Hon. George B. Cortelyou, Secretary of the Treasury of the United States, established the fol-

[* In pencil in copy.]

lowing regulation for the information and guidance of officers of the customs, which regulation has ever since been in full force and effect.

Art. 62. Certificate of Protection. Any foreign-built vessel purchased by a citizen, although prohibited from being documented, is nevertheless entitled to legal protection as property of a citizen.

The collector may issue to any such vessel, owned by a citizen, a certificate in proper form, of the validity and filing of the bill of sale. A separate record will be kept of these vessels, and in the tonnage returns they will be reported in a separate column, under the head of "Foreign-built or undocumented vessels owned by citizens of the United States."

7. On or about the 1st day of October, 1907, the defendant laid up the said yacht and berthed her at Brooklyn in the State of New York, and ever since said date she has been at Brooklyn aforesaid and out of commission and has not been used by the defendant or by any one else in the sense of being navigated or put to purposes of pleasure. Defendant, however, could have used her, if he had so desired, said vessel being neither wrecked nor dismantled, though she was out of commission and not immediately ready for sea, and he did keep on board of her a master and a few men to look after her.

8. On or about the 1st day of September, 1910, the Collector of Customs at the Port of New York levied a tax under Section
34 37 of the Tariff Act of August 5th, 1909, of $7.00 per gross ton upon the use of the said yacht, and gave notice to the defendant and demanded payment thereof. The amount of the said tax was the sum of $3,682. and has not been paid, nor has defendant paid a duty of 35 per cent. ad valorem upon the said yacht in lieu of the said tax. The district of the said Collector was the district nearest the residence of the defendant.

9. The said yacht has never been registered, enrolled or documented as a vessel of the United States.

10. At the time of the passage of the said Tariff Act of August 5th, 1909, and on the said 1st day of September, 1910, there were, and ever since have been, in the United States, and within its jurisdiction, a large number of yachts, pleasure-boats and vessels, not used or intended to be used for trade, and not foreign-built, which were then owned or chartered for more than six months by citizens of the United States, and which were and are similar to the defendant's said yacht in all substantial respects as to construction, character and nature of property, and identical with the said yacht in all respects as to use and as being personal property of citizens of the United States, but upon the use of which property so similarly situated no tax is imposed by the said act of congress and that no such tax has in fact been imposed upon such yachts not foreign-built.

35 Conclusions of Law.

1. Section 37 of the Tariff Act of August 5th, 1909, is valid and not in conflict with the Constitution of the United States, or any portion thereof, and the tax imposed thereby is not unreasonably

arbitrary or discriminatory. It does not deprive the defendant of his property without due process of law.

2. The said steam yacht "Yacona" is a foreign-built yacht within the meaning of said Section 37 of the Tariff Act of August 5th, 1909.

3. The said steam yacht "Yacona" is not entitled to be registered, enrolled or documented as a vessel of the United States.

4. The said tax of $3,682 was duly and lawfully levied under the said Act by the Collector of Customs of the Port of New York on the 1st day of September, 1910, against the defendant on the use of the said yacht.

5. The plaintiff is entitled to judgment against the defendant for the sum of $3,682., with its costs and disbursements, but without interest, and I direct judgment accordingly.

Dated, New York, July 5 1911.

C. M. HOUGH, *D. J.*

(Endorsed:) U. S. Circuit Court, Southern District N. Y., Filed Jul- 5, 1911, John A. Shields, Clerk.

36 Circuit Court of the United States, Southern District of New York.

Action No. 2.

UNITED STATES OF AMERICA, Plaintiff,
against
HENRY CLAY PIERCE, Defendant.

Exceptions.

The defendant excepts to the conclusions of law made by the court numbered I, IV and V.

Dated New York, July 13, 1911.

GUTHRIE, BANGS & VAN SINDEREN,
Attorneys for Defendant.

Office and Post Office Address, 44 Wall Street, Borough of Manhattan, New York City.

(Endorsed:) U. S. Circuit Court, Southern District N. Y. Filed Jul- 13, 1911. John A. Shields, Clerk.

37 *Judgment.*

United States Circuit Court, Southern District of New York.

Action No. 2.

UNITED STATES OF AMERICA, Plaintiff,
vs.
HENRY CLAY PIERCE, Defendant.

The issues in this action having duly come on for trial before Hon. Charles M. Hough, District Judge, at a Stated Term of this Court held at the United States Court House and Post Office Building, in the Borough of Manhattan, City, County and State of New York, on the 10th and 11th days of April, 1911, without a jury, a jury having been waived by consent of both parties in open Court, and the Court, after due deliberation, having directed judgment in favor of the plaintiff and against the defendant for the sum of Three thousand six hundred and eighty-two dollars ($3682.00), with costs and disbursements, but without interest, and having thereafter, on the 5th day of July, 1911 duly made and filed its decision in favor of the plaintiff and against the defendant, containing a statement of the facts found and the conclusions of law thereon, and directing judgment in favor of the plaintiff and against the defendant for the sum of Three thousand six hundred and eighty two dollars ($3682.00), with costs and disbursements but without interest,

Now, on motion of Henry A. Wise, United States Attorney for the Southern District of New York, Attorney for the plain-
38 tiff, it is

Ordered and adjudged, that the plaintiff have judgment against the defendant for the sum of Three thousand six hundred and eighty-two dollars ($3682.00) without interest, but with its costs and disbursements, to be taxed by the Clerk of this Court and amounting as taxed to the sum of $19.27/100 and making the total sum of $3701.27/100 and that execution issue therefor.

Dated, July 13th, 1911.

Judgment signed this 13th day of July, 1911.

JOHN A. SHIELDS, *Clerk.*

(Endorsed:) U. S. Circuit Court, Southern District N. Y. Filed Jul- 13, 1911. John A. Shields, Clerk.

39 United States Circuit Court, Southern District of New York.

Action #2.

UNITED STATES OF AMERICA, Plaintiff,
vs.
HENRY CLAY PIERCE, Defendant.

Bill of Exceptions.

On the trial of this cause in this Court, on the 10th and 11th days of April, 1911, the Hon. Charles M. Hough, District Judge, then presiding, the plaintiff appearing by Addison S. Pratt, Assistant United States Attorney of counsel and the defendant by Francis S. Bangs, of counsel, the following proceedings were had, to wit:

Trial by a jury was waived by the defendant in open court, and thereupon the plaintiff, to sustain the issue upon its part, offered the following testimony and evidence.

Mr. PRATT: There is an additional defense in this case which I may state to your Honor briefly. That is, that the defendant's yacht was not in use by the defendant or by any other person at any time during the year preceding the 1st of September, 1910, but was out of commission, and laid up unused, in Brooklyn, New York State, throughout the whole of such year. Otherwise, the
40 complaint is just the same thing.

Mr. PRATT: It is also stipulated that on the 13th day of November, 1899, Hon. Lyman J. Gage, Secretary of the Treasury, established certain customs regulations which are to be found in the printed volume entitled "Customs Regulations 1909, Treasury Department," among which is Article 62, which is in the exact language as set forth in the complaint, except that for the word "proper" is used the word "prescribed."

This regulation is printed in full in Paragraph 5 of the Decision.

It is also stipulated that on the 2nd day of January, 1908, Hon. George B. Cortelyou, Secretary of the Treasury, established certain customs regulations, which are to be found in the volume entitled "Customs Regulations, 1908, Treasury Department," among which are Article 62, which is in the exact language as set forth in the complaint.

This regulation is printed in full in Paragraph 6 of the Decision.

Mr. PRATT: I offer in evidence certified copy of the bill of sale of the yacht Yacona by Gustavus Pratt to Henry Clay Pierce, dated June 7th, 1902, recorded at the office of the Collector of Boston, and a certified copy of the certificate which was recorded at the same time in the same office, which certificate appears to have been executed and issued under Article 62 just referred to. Now, there is an obvious error in the date of this certificate. The date of the bill

of sale is June 7th, the date of the certificate is July 3rd.
41 The Collector of Boston has informed me that he is of the opinion and believes that the certificate should have been dated July 3rd.

Received in evidence as Government's Exhibit 1, and the following is a copy thereof:

"Bill of Sale.

Official Number 109,050. Name of Ship Yacona No. 1, Date 1902 Port of Registry London, Steam Screw 150 N. H. P. 900 I. H. P.

	Ft.	Tenths.
Length from forepart of stem, under the bowsprit, to the aft side of the head of the stern post.....	188	6
Main breadth to outside of plank.....	27	2
Depth from top of deck at side amidships to bottom of keel	15	7

Number of Tons Gross 527.35 Registered 169.63.

I Gustavus Pratt of Suffolk Street Pall Mall London, Gentlemen in consideration of the Sum of Twenty six Thousand Pounds (£26,000) paid to me by Henry Clay Pierce of New York City, U. S. A. the receipt whereof is hereby acknowledged, transfer Sixty four Shares in the Ship above particularly described, and in her boats, guns, ammunition, small arms, and appurtenances, to the said Henry Clay Pierce. Further that I the said Gustavus Pratt for myself and my heirs covenant with the said Henry Clay Pierce and his assigns, that I have power to transfer in manner aforesaid the premises herein.before expressed to be transferred and that the same are free from incumbrances.

In witness whereof I have hereunto subscribed my name
42 and affixed my seal this 6th day of June One thousand nine hundred and two.

GUSTAVUS PRATT. [SEAL.]

Executed by the above named Gustavus Pratt in the presence of
S. CHEESWRIGHT,
Notary Public, London.

To all to whom these presents shall come, I Stanley Cheeswright of the City of London Notary Public by Royal Authority duly admitted and sworn do hereby certify that I was present and did see Gustavus Pratt duly sign seal and execute the Bill of Sale of the Steam Ship "Yacona" hereunto annexed, transferring the said vessel, free from incumbrances unto Henry Clay Pierce of New York City United States of America an American citizen and I further certify that the Certificate of British Registry has been duly delivered up and cancelled and the Registry closed in accordance with English Law upon sale of Ship to Foreigner as appears by the Cer-

tified Transcript of Register hereunto annexed given under the hand and seal of the Registrar of Shipping at the Port of Registry of the said vessel.

Also that there are no mortgages or incumbrances existing as recorded registered.

In faith and testimony whereof I the said Notary Public have subscribed my name and set and affixed my seal of Office at London aforesaid this Seventh day of June One thousand nine hundred and two.

[SEAL.] S. CHEESWRIGHT,
Notary Public.

43 Consulate-General of the United States of America for Great Britain & Ireland at London.

I Francis W. Frigout, Deputy-Consul-General of the United States of America at London, England do hereby make known and certify to all whom it may concern that Stanley Cheeswright who hath signed the annexed Certificate, is a Notary Public duly admitted and sworn and practising in the City of London, aforesaid and that to all acts by him so done full faith and credit are and ought to be given in Indicature and Thereout.

In testimony whereof, I have hereunto set my hand and affixed my Seal of Office at London aforesaid, this Ninth day of June, in the year of our Lord One Thousand Nine Hundred and Two.

[CONSULATE SEAL.] FRANCIS W. FRIGOUT,
Deputy Consul-General.

KINGDOM OF GREAT BRITAIN AND IRELAND,
City of London, England:

I, Francis W. Frigout, Deputy Consul General of the United States of America at London England, do hereby certify that the within named Henry Clay Pierce is a citizen of the United States of America, at present of New York, satisfactory evidence of such citizenship having been proved to me. Witness my hand and seal of office at London England this the 9th day of June A. D. 1902.

Received for Record July 1, 1902, 1 P. M.

[CONSULATE SEAL.] FRANCIS W. FRIGOUT,
Deputy Consul-General of United States of America.

44 (Sgd.) JAMES REILLY,
Register of Sales and Transfers at London, England.

BOSTON, *March* 3, 1911.

I hereby certify that the above is a true copy of the record of this office.

[SEAL.] WM. F. JONES,
Deputy Collector.

I, William F. Jones, Deputy Collector of Customs at the Port of Boston, District of Boston and Charlestown do hereby certify that the within Bill of Sale of the Steam yacht Yacona, dated June 6, 1902, Gross tonnage 527.35 tons, net tonnage 169.63 tons (British measurement) transferring said yacht from Gustavus Pratt to Henry Clay Pierce of New York has been duly recorded at this office and that it appears to be a valid conveyance, and that said Henry Clay Pierce is a citizen of the United States.

Witness my hand and seal this 3rd day of June in the year of our Lord 1902.

[Seal of United States.]

(Sgd.) WM. F. JONES,
Deputy Collector.

A True Copy of the original as appears by the records of this office.

[SEAL.] WM. F. JONES,
Dep. Collector.

The certificate is printed in full in Paragraph 4 of the Decision.

The Government rests.

45 Mr. BANGS: I move to dismiss the complaint on the ground that it does not state facts sufficient to constitute a cause of action, and

On the ground that no facts have been proven constituting a cause of action.

Motion denied. Exception by defendant.

Mr. BANGS: I am assuming in all these cases, your Honor, that as these vessels are admittedly foreign-built vessels, and are not entitled to be registered or documented, that they are in fact not registered or documented.

Mr. PRATT: I will make such an admission, if you wish, because that is the fact.

WILLETT L. WAGNER, a witness called on behalf of the defendant, being duly sworn, testified as follows:

Direct examination by Mr. BANGS:

I am Financial Secretary to Mr. H. Clay Pierce. I know of my own knowledge the present location of the yacht Yacona. She is at the Morse Dry Dock and Repair Company, Brooklyn, foot of 56th Street and has been there since October 1st, 1907, when she went out of commission, at that date. She has not been used by her owner nor by any other person since that date.

Q. Has any money been expended upon that yacht since her purchase by Mr. Pierce?

Mr. PRATT: I object as wholly immaterial and irrele-
46 vant.

The COURT: I will allow it.

Exception by the Government.

Q. Do you know?

A. Yes. About $293,000 has been expended upon her since she has been purchased, in the United States.

Q. What was her original cost?

Mr. PRATT: I object to that as wholly immaterial and irrelevant.

Objection overruled. Exception by the Government.

A. I prefer not to answer without Mr. Pierce's consent, if I may be allowed that privilege.

The COURT: Apparently, the Government won't object.

Q. I think you had better answer the question?

A. About $135,000.

Cross-examination by Mr. PRATT:

I mean by out of commission that she has been in her berth at the Morse Dry Dock since that time. The captain and a few men have been living on her to look after the yacht. I should say on an average about four men besides the master from October 1, 1907.

Q. Of this sum of $293,000 which has been spent upon her, that includes painting, does it?

A. Not the yearly painting to keep the yacht in shape, but probably includes something at the time the boat was entirely remodeled and improved, but not the yearly painting of the hull to keep her from rusting.

Q. In other words it is your opinion that all of this
47 $293,000 is for upkeep?

A. Not for upkeep—for betterment and improvement.

Mr. BANGS: I will make the formal motion to dismiss.

The COURT: Do both sides rest?

Mr. BANGS: I will read this further stipulation.

That at the time of the passing and approval of the act of Congress entitled "An Act to provide revenue, equalize duties and encourage the industries of the United States, and for other purposes," approved August 5, 1909, and of the alleged levy of said annual tax upon the use of this defendant's said yacht, pursuant to section 37 of said Act, there were and ever since have been in the United States, and within its jurisdiction, a large number of yachts, pleasure-boats and vessels not used or intended to be used for trade, and not foreign-built, which were then owned or chartered for more than six months by citizens of the United States, and which were and are similar to this defendant's said yacht in all substantial respects as to construction, character and nature of property and identical with this defendant's said yacht in all respects as to use and as being personal property of citizens of the United States, but upon the use of which property so similarly situated no tax is imposed by the said act of Congress, and that no tax has in fact been imposed upon such domestic built yachts.

Mr. BANGS: The defendant rests.

Mr. PRATT: There is no rebuttal. The Government moves for judgment.

48 Mr. BANGS: I renew the motion to dismiss on the grounds stated at the close of the Government's case, and upon the following additional grounds: (1) That the defendant's yacht has not been in use between September 1, 1909, and September 1, 1910; (2) That at the time of the passing and approval of the Act of August 5, 1909, and of the alleged levy of the tax on the use of the defendant's yacht, pursuant to section 37 of said act, there were and ever since have been in the United States and within its jurisdiction a large number of yachts, pleasure boats and vessels not used or intended to be used for trade and not foreign-built, which were then owned or chartered for more than six months by citizens of the United States, and which were and are similar to this defendant's said yacht in all substantial respects as to construction, character and nature of property, and identical with the defendant's yacht in all respects as to use and as being personal property of citizens of the United States, but upon the use of such property so similarly situated no tax is imposed by the said Act of Congress. That said Act of Congress, in so far as it purports in and by section 37 thereof to direct the levy and collection of a tax upon the use of the defendant's yacht, is not a general law operating upon all citizens of the United States owning and using like property under substantially similar conditions and circumstances, and that the levy and collection from the defendant of a sum equivalent to a tonnage tax of $7 per gross ton

49 does not constitute the levy and collection of any tax, duty, impost or excise within the true meaning of the Constitution of the United States, and would deprive the defendant of his property without due process of law in contravention of the fifth article of the amendment to the Constitution of the United States.

The COURT: You may note on the record that the defendant moves to dismiss the complaint and plaintiff moves for judgment. Both motions were taken into consideration and briefs to be submitted.

And thereafter, the Court rendered its decision in writing directing judgment in favor of the plaintiff and against the defendant for the amount demanded in the complaint, to which action of the court the defendant thereafter duly excepted.

And now in furtherance of justice and that right may be done, the defendant, H. Clay Pierce, tenders and presents the foregoing as his bill of exceptions in this case to the action of the Court, and prays that the same may be settled and allowed and signed and sealed by the Court and made a part of the record.

The foregoing bill of exceptions is hereby settled and allowed and signed and sealed, and is ordered on file and made a part of the record, this 15th day of July, 1911.

C. M. HOUGH, *D. J.*

Approved and agreed upon
HENRY A. WISE,
Attorney for Plaintiff.
GUTHRIE, BANGS & VAN SINDEREN,
Attorneys for Defendant.

50 (Endorsed:) U. S. Circuit Court, Southern District N. Y., Filed Jul- 17, 1911, John A. Shields, Clerk.

51 Circuit Court of the United States, Southern District of New York.

Action No. 2.

UNITED STATES OF AMERICA, Plaintiff,
against
H. CLAY PIERCE, Defendant.

Assignment of Errors.

The defendant in this action in connection with his petition for a writ of error, assigns for error the following:

First. The court erred in entering judgment in favor of the plaintiff and against the defendant for the amount demanded in the complaint.

Second. The court erred in ruling that the defendant's yacht was subject to the tax laid under Section 37 of the Act of August 5, 1909 (c. 6, 39 Stat. 11).

Third. The court erred in holding that the defendant's yacht was subject to the said tax without proof that there had been any use of said yacht in or during the year preceding September 1, 1910.

Fourth. The court erred in holding that the said Act did not conflict with the requirement of due process of law contained in the Fifth Amendment to the Constitution of the United States.

Wherefore, the defendant prays that the judgment of the said Circuit Court be reversed.

GUTHRIE, BANGS & VAN SINDEREN,
Attorneys for Defendant.

Office and Post Office Address: 44 Wall Street, Borough of Manhattan, City of New York.

52 (Endorsed:) A copy of the within paper has been this day received at this office. Jul- 13, 1911. Henry A. Wise, U. S. Attorney.—U. S. Circuit Court, Southern District N. Y., Filed Jul- 13, 1911, John A. Shields, Clerk.

53 *Bond.*

United States Circuit Court, Southern District of New York.

Action No. II.

UNITED STATES OF AMERICA, Complainant,
against
H. CLAY PIERCE, Defendant.

Know all men by these presents: That the Fidelity and Deposit Company of Maryland, a surety corporation duly authorized to

transact business under the Act of Congress approved August 13th, 1894, and having an office at No. 2 Rector Street, in the Borough of Manhattan, in the City of New York, is held and firmly bound unto the United States of America in the sum of four thousand dollars ($4000.00), lawful money of the United States, to be paid to the said United States of America; for which payment, well and truly to be made, the said Fidelity and Deposit Company of Maryland binds itself, its successors and assigns, firmly by these presents.

Sealed with its corporate seal. Dated this thirteenth day of July, Nineteen hundred and eleven.

Whereas, lately at a Circuit Court of the United States for the Southern District of New York, in a suit depending in said Court between the Complainant and Defendant hereinabove named, a final judgment was rendered against the said H. Clay Pierce, and the said H. Clay Pierce having obtained a writ of error and filed a copy thereof in the Clerk's office of the said Court, to reverse the final judgment in the aforesaid suit, and a citation directed to the said United States of America, citing and admonishing it to be and

54 appear at a session of the Supreme Court of the United States to be holden at the City of Washington.

Now, the condition of the above obligation is such, that if the said H. Clay Pierce shall prosecute his said appeal to effect, and answer all damages and costs if he fail to make said plea good, then the above obligation to be void; otherwise to remain in full force and effect.

FIDELITY AND DEPOSIT COMPANY OF MARYLAND,
By CHARLES V. R. MARSH, *Attorney-in-Fact.*

Attest:
[SEAL.] JAMES R. KINGSLEY, *Attorney.*

(Surety Company Statement attached.)

Approved as to form and also as to sufficiency of sureties, with reservation, however, to the defendant in error, of the right at any time to examine the proper officers of the Surety Company, under oath, touching its assets, liabilities and financial condition generally.

WALTER C. NOYES,
U. S. Circuit Judge.

(Endorsed:) U. S. Circuit Court, Southern District N. Y., Filed Jul- 13, 1911, John A. Shields, Clerk.

55 *Citation.*

THE UNITED STATES OF AMERICA, *ss:*

To the United States of America, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, to be holden at the city of

Washington, on the 12th day of August, 1911, next, pursuant to a writ of error filed in the Clerk's office of the Circuit court of the United States for the Southern District of New York, wherein H. Clay Pierce is the plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said defendant in error, as in the said writ of error mentioned, should not be corrected, and speedy justice be done to the parties in that behalf.

Given under my hand at the Borough of Manhattan, in the City of New York, in the District and Circuit above named, this 13th day of July in the year of our Lord one thousand nine hundred and eleven, and of the Independence of the United States the one hundred and thirty-sixth.

WALTER C. NOYES,
Judge of the Circuit Court of the United States
for the Southern District of New York.

56 [Endorsed:] Law. 6/106. E. & A. D. 3265. Supreme Court of the United States. H. Clay Pierce, Plaintiff-in-error, against United States of America, Defendant-in-error. Action No. 2. Citation. William D. Guthrie, Attorney for Plaintiff-in-error, 44 Wall St., New York. A copy of the within paper has been this day received at this office. Jul- 13, 1911. Henry A. Wise, U. S. Attorney. U. S. Circuit Court, Southern District N. Y. Filed Jul- 13, 1911. John A. Shields, Clerk.

[Endorsed:] United States Supreme Court. H. Clay Pierce, Plaintiff in Error, vs. United States of America, Defendant in Error. Action No. 2. Transcript of Record.

Endorsed on cover: File No. 22,814. S. New York C. C. U. S. Term No. 65. H. Clay Pierce, plaintiff in error, vs. The United States. Filed July 25th, 1911. File No. 22,814.

(22,815)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1913.

No. 66.

CORNELIUS K. G. BILLINGS, PLAINTIFF IN ERROR,

vs.

THE UNITED STATES.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

INDEX.

	Original.	Print
Petition for writ of error	1	1
Order allowing writ	2	1
Writ of error	3	2
Clerk's certificate	4	3
Summons	6	3
Amended complaint	7	4
Answer	10	5
Demurrer	14	7
Opinion, Noyes, C. J	16	8
Order sustaining demurrer	38	20
Order denying application for interest	40	21
Judgment	41	22
Assignment of errors	43	22
Bond	45	23
Citation	47	24

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JULY 8, 1913.

1 Circuit Court of the United States for the Southern District of New York.

At Law.

UNITED STATES OF AMERICA, Plaintiff,
against
CORNELIUS K. G. BILLINGS, Defendant.

Petition for Writ of Error.

And now comes Cornelius K. G. Billings, defendant herein, and says: That on or about the 13th day of July 1911, the Circuit Court of the United States for the Southern District of New York entered a judgment herein in favor of the plaintiff and against this defendant, in which judgment and the proceedings had prior thereto in this cause, certain errors were committed to the prejudice of this defendant, all of which will more in detail appear from the assignment of errors which is filed with this petition.

Wherefore, this defendant prays that a writ of error may issue in this behalf out of the Supreme Court of the United States for the correction of errors so complained of, and that a transcript of the record, proceedings and papers in this cause, duly authenticated, may be sent to the Supreme Court of the United States.

WILLIAM D. GUTHRIE,
Attorney for Defendant,
44 *Wall Street, New York City, N. Y.*

(Endorsed:) A copy of the within paper has been this day received at this office Jul- 13, 1911. Henry A. Wise, U. S. Attorney.—U. S. Circuit Court, Southern District N. Y. Filed Jul- 13, 1911. John A. Shields, Clerk.

2 *Order Allowing Writ of Error and Supersedeas.*

Circuit Court of the United States for the Southern District of New York.

At Law.

UNITED STATES OF AMERICA, Plaintiff,
against
CORNELIUS K. G. BILLINGS, Defendant.

This 13th day of July, 1911, comes the defendant, by William D. Guthrie his attorney, and files herein and presents to the court his petition praying for the allowance of a writ of error, and an assignment of errors intended to be urged by him, praying also that a tran-

script of the record and proceedings and papers upon which the judgment herein was rendered, duly authenticated, may be sent to the Supreme Court of the United States, and that such other and further proceedings may be had as are proper in the premises.

On consideration whereof the court does allow the writ of error upon the defendant's giving bond according to law in the sum of Eight thousand dollars ($8,000.00) which shall operate as a supersedeas bond.

WALTER C. NOYES,
United States Circuit Judge.

(Endorsed:) A copy of the within paper has been this day received at this office Jul- 13, 1911. Henry A. Wise, U. S. Att'y.—U. S. Circuit Court, Southern District N. Y. Filed Jul- 13, 1911. John A. Shields, Clerk.

3 *Writ of Error.*

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Judges of the Circuit Court of the United States for the Souhern District of New York, Greeting:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the Circuit Court, before you, or some of you, between the United States of America, plaintiff, and Cornelius K. G. Billings, defendant, a manifest error hath happened, to the great damage of the said Cornelius K. G. Billings as is said and appears by his complaint, we, being willing that such error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at the City of Washington on the 12th day of August 1911, in said Supreme Court, to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein, to correct that error, what of right and according to the law and custom of the United States ought to be done.

Witness, the Honorable Edward D. White, Chief Justice of the Supreme Court of the United States, this 13th day of July in the
4 year of our Lord one thousand nine hundred and eleven, and of the Independence of the United States the one hundred and thirty-sixth.

[Seal United States Circuit Court, South. Dist. New York.]

JOHN A. SHIELDS,
Clerk of the Circuit Court of the United States Circuit Court for the Southern District of New York, in the Second Circuit.

The foregoing writ is hereby allowed.

WALTER C. NOYES,
U. S. Circuit Judge.

Clerk's Certificate.

UNITED STATES OF AMERICA,
Southern District of New York, ss:

I, John A. Shields, Clerk of the Circuit Court of the United States of America, for the Southern District of New York, in the Second Circuit, by virtue of the foregoing Writ of Error, and in obedience thereto, do hereby certify, that the following pages numbered from one to 48 inclusive, contain a true and complete transcript of the record and proceedings had in said Court in the cause of Cornelius K. G. Billings, Plaintiff in Error, against United States of America, Defendant in Error; as the same remain of record and in file in said office.

In testimony whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, in the Second Circuit, this 20th day of July, in the year of our Lord one thousand nine hundred and eleven, and of the Independence of the United States the one hundred and thirty-sixth.

[Seal United States Circuit Court, South. Dist. New York.]

JOHN A. SHIELDS, *Clerk.*

5 [Endorsed:] Law. 4/157. E. & A. D. 3266. Supreme Court of the United States. Cornelius K. G. Billings, Plaintiff-in-Error, against United States of America, Defendant-in-Error. Writ of Error. William D. Guthrie, Attorney for Plaintiff-in-Error, 44 Wall Street, New York City. U. S. Circuit Court, Southern District N. Y. Filed Jul- 13, 1911. John A. Shields, Clerk. A copy of the within paper has been this day received at this office. Jul- 13, 1911. Henry A. Wise, U. S. Attorney.

6 United States Circuit Court, Southern District of New York.

THE UNITED STATES OF AMERICA, Plaintiff,
against
CORNELIUS K. G. BILLINGS, Defendant.

Summons.

To the above-named defendant:

You are hereby summoned to answer the complaint in this action and to serve a copy of your answer on the plaintiffs attorney within twenty days after the service of this summons, exclusive of the day of service; and in case of your failure to appear, or answer, judgment

will be taken against you by default for the relief demanded in the complaint.

Witness, the Honorable Melville W. Fuller, Chief Justice of the United States, at the Borough of Manhattan in the City of New York, this 29th day of October, in the year one thousand nine hundred and nine.

[L. S.] JOHN A. SHIELDS, *Clerk.*

Henry A. Wise, Plaintiffs Attorney, Office and Post Office Address, Borough of Manhattan, New York City.

7 United States Circuit Court, Southern District of New York.

UNITED STATES OF AMERICA,
vs.
CORNELIUS K. G. BILLINGS.

Amended Complaint.

The plaintiff above named, by Henry A. Wise, United States Attorney for the Southern District of New York, its attorney, for its amended complaint against the defendant above named, alleges, on information and belief, as follows:

First. That the plaintiff is a corporation Sovereign.

Second. That the defendant is a citizen of the United States.

Third. That on the 1st day of September, 1909, the defendant was the managing owner of the yacht "Vanadis"; that the said yacht was, and is, a foreign built vessel, and that it was built in the Kingdom of Great Britain; that the said yacht had a gross tonnage of 1091.79 tons; that the said yacht had not been, and was not, used or intended to be used for trade.

Fourth. That on or about the 1st day of September, 1909 the Collector of Customs at the Port of New York, that being the District nearest the residence of the defendant, fixed and determined the sum of Seven thousand six hundred and forty-four dollars
8 ($7,644) as the sum equivalent to the tonnage tax of seven dollars ($7) per gross ton upon the use of the said yacht, and thereby levied a tonnage tax in said amount upon the use of the same.

Fifth. That the said Collector of Customs at the Port of New York gave notice to the defendant of the levy of the said tax, and demanded payment thereof on the 1st day of September, 1909, prior to the commencement of this action, but no part thereof has been paid, and the defendant has not paid a duty of thirty-five per cent. (35%) ad valorem upon the said yacht, in lieu of the said tax.

Wherefore, plaintiff demands judgment against the defendant for the sum of Seven thousand six hundred and forty-four dollars

($7,644), with interest thereon from the first day of September, 1909, together with the costs and disbursements of this action.

HENRY A. WISE.
United States Attorney for the Southern District of New York, Attorney for the Plaintiff.

Office and Post Office Address, Room 50, United States Court House and Post Office Building, Borough of Manhattan, City of New York, N. Y.

STATE OF NEW YORK,
County of New York,
Southern District of New York, ss:

Addison S. Pratt, being duly sworn, deposes and says:

That he is an assistant to the United States Attorney for the Southern District of New York, plaintiff's attorney; that he
9 has read the foregoing complaint and knows the contents thereof; that the same is true of his own knowledge, except as to the matters therein stated to be alleged upon information and belief, and as to those matters he believes it to be true;

That the reason why this verification is made by deponent and not by plaintiff is, that the latter is a corporation Sovereign.

That the sources of deponent's information and the grounds of his belief are communications received from the Collector of Customs of the Port of New York and the Commissioner of Navigation of the Department of Commerce and Labor.

ADDISON S. PRATT.

Sworn to before me this 18th day of January, 1911.

[SEAL.] FREDERICK L. CAMPBELL,
Notary Public, Kings Co.

Cert. filed in N. Y. Co.

(Endorsed:) U. S. Circuit Court Southern District N. Y. Filed Jan. 19, 1911. John A. Shields, Clerk.

10 United States Circuit Court, Southern District of New York.

UNITED STATES OF AMERICA, Plaintiff,
against
CORNELIUS K. G. BILLINGS, Defendant.

Answer.

And now comes the defendant above named, and by Guthrie, Bangs & Van Sinderen, his attorneys, answers the amended complaint of the plaintiff, United States of America, and thus answering:

I. For a First Defense:

Alleges on information and belief that the yacht "Vanadis" has not at any time been, and is not now, registered, enrolled or docu-

mented as a vessel of the United States, and is not entitled to enjoy or exercise, and has never enjoyed or exercised, any rights, privileges or protection as a vessel or yacht of the United States, and has been used by the defendant outside of the waters and territorial limits or jurisdiction of the United States from time to time and at various times during the year preceding the first day of September, 1909, and was not used for six months during such year within the waters and territorial limits or jurisdiction of the United States or elsewhere.

II. For a Second and Separate Defense:

Alleges on information and belief that it was the intention of Congress, in and by the Act of Congress, entitled "An Act to
11 provide revenue, equalize duties, and encourage the industries of the United States," approved August 5, 1909, as appears upon the face thereof, that the sum thereby directed to be levied and collected upon the use of every foreign built yacht, pleasure boat or vessel owned or chartered for more than six months by any citizen of the United States, should be an annual tax, that it should be prospective, and operate only upon the future use of any such foreign-built yacht, pleasure-boat or vessel, and that said annual tax did not accrue and could not be duly levied and collected prior to the first day of September in the year 1910.

III. For a Third and Separate Defense:

Alleges on information and belief that at the time of the passing and approval of said act of Congress as aforesaid, and of the alleged levy of said annual tax upon the use of this defendant's said yacht, there were, and ever since have been, in the United States, and within its jurisdiction, a large number of yachts, pleasure-boats and vessels not used or intended to be used for trade, and not foreign-built, which were then owned or chartered for more than six months by citizens of the United States, and which were and are similar to this defendant's said yacht in all substantial respects as to construction, character and nature of property, and identical with this defendant's said yacht in all respects as to use and as being personal property of citizens of the United States, but upon the use of which property so similarly situated no tax is imposed by the said act of Congress; that said act of Congress, in so far as it purports in and by Section 37 thereof to direct the levy and collection of a tax upon the use of this defendant's said yacht, is not a general law operating upon all citizens of the United States owning and using like property under substantially similar conditions and circumstances, and that
12 the levy and collection from this defendant of said sum, equivalent to a tonnage tax of seven dollars per gross ton, would not constitute the levy and collection of any tax, impost or excise within the true meaning of the Constitution of the United States, but would deprive this defendant of his property without due process of law, in conflict with the Fifth Article of Amendment to the Constitution of the United States.

Wherefore, the defendant prays that the complaint of the United

States of America in the above-entitled action be dismissed, with costs.

GUTHRIE, BANGS & VAN SINDEREN,
Attorneys for the Defendant.

Office and Post Office Address, 44 Wall Street, Borough of Manhattan, New York City.

13 UNITED STATES OF AMERICA,
Southern District of New York, ss:

Howard Van Sinderen, being duly sworn, says: That he is one of the attorneys for the defendant above named; that the foregoing answer is true to the knowledge of deponent, except as to those matters therein stated to be alleged on information and belief, and that as to those matters he believes it to be true; that the reason why this affidavit is not made by the defendant is that the defendant is not now within the Southern District of New York wherein deponent resides; that information derived by deponent from various sources in the course of investigations made by deponent into the matters stated in the said answer constitutes the grounds of deponent's belief as to all matters not stated upon his knowledge.

HOWARD VAN SINDEREN.

Sworn to before me this 30th day of January, 1911.
[SEAL.] THOMAS C. CURTIS, JR.
Notary Public, New York County, N. Y.

(Endorsed:) U. S. Circuit Court, Southern District N. Y. Filed Jan-. 30, 1911. John A. Shields, Clerk.

14 United States Circuit Court, Southern District of New York.

At Law.

UNITED STATES OF AMERICA, Plaintiff,
vs.
CORNELIUS K. G. BILLINGS, Defendant.

Demurrer.

The plaintiff above named, by Henry A. Wise, United States Attorney for the Southern District of New York, its attorney, hereby demurs to the answer of the defendant to the amended complaint herein, and to each and every defense in the said answer contained, on the ground that each and every said defense is insufficient in law on the face thereof, and does not state facts sufficient to constitute a defense to the cause of action in the plaintiff's amended complaint.

HENRY A. WISE,
United States Attorney for the Southern District of New York, Attorney for Plaintiff.

Office and Post Office Address, Room 50, Post Office Building, Borough of Manhattan, City of New York.

15 STATE OF NEW YORK,
County of New York,
Southern District of New York, ss:

Addison S. Pratt, being duly sworn, deposes and says: I am an assistant to the United States Attorney for the Southern District of New York. The foregoing demurer is not interposed for delay, and, in my opinion, the same is well founded in point of law.

ADDISON S. PRATT.

Sworn to before me this 2d day of Febuary, 1911.

[SEAL.] FREDERICK L. CAMPBELL,
Notary Public, Kings Co.

Cert. filed in N. Y. Co.

(Endorsed:) Copy received, Feb. 2, 1911, Guthrie, Bangs & Van Sinderen.—U. S. Circuit Court, Southern District N. Y. Filed Feb. 3, 1911, John A. Shields, Clerk.

16 *Opinion.*

United States Circuit Court, Southern District of New York.

UNITED STATES OF AMERICA
v.
CORNELIUS K. G. BILLINGS.

UNITED STATES OF AMERICA
v.
JAMES GORDON BENNETT.

UNITED STATES OF AMERICA
v.
HARRIET GOELET.

UNITED STATES OF AMERICA
v.
H. CLAY PIERCE.

UNITED STATES OF AMERICA
v.
ROY A. RAINEY.

On Demurrers to Answers.

NOYES, *Circuit Judge:*

These actions are brought by the United States to recover the annual tonnage tax upon the use of foreign built yachts under Section

37 of the Tariff Act of 1909, which is printed in full in the foot note.*

17 The complaint in each action alleges in substance that the defendant therein was, on September 1st, 1909, a citizen of the United States and the managing owner of a foreign-built yacht and that the tax in question was duly levied and has never been paid.

The defendants have severally answered, setting up separate defenses and each presenting defenses of a different nature. These defenses go both to the constitutionality of the statute and its application upon different states of facts, so that upon the several demurrers of the Government the questions of constitutionality and interpretation are clearly presented and are presented in different phases. The important questions so raised may properly be considered in this order:

(1) Is the statute so discriminatory in its provisions as to violate the Fifth Amendment to the Constitution of the United States?**

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*"There shall be levied and collected annually in the first day of September by the collector of customs of the district nearest the residence of the managing owner, upon the use of every foreign-built yacht, pleasure-boat or vessel, not used or intended to be used for trade, now or hereafter, owned or chartered for more than six months by any citizen or citizens of the United States, a sum equivalent to a tonnage tax of seven dollars per gross ton.

"In lieu of the annual tax above prescribed the owner of any foreign-built yacht, pleasure-boat or vessel above described may pay a duty of thirty-five per centum ad valorem thereon, and such yacht, pleasure-boat or vessel shall thereupon be entitled to all the privileges and shall be subject to all the requirements prescribed by sections forty-two hundred and fourteen, forty-two hundred and fifteen, forty-two hundred and seventeen, and forty-two hundred and eighteen of the Revised Statutes and Acts amendatory thereto in the same manner as if said yacht had been built in the United States, and shall be subject to tonnage duty and light money only in the same manner as if said yacht had been built in the United States.

"So much of section five of chapter two hundred and twelve of the laws of nineteen hundred and eight, approved May twenty-eighth, nineteen hundred and eight, as relates to yachts built outside the United States and owned by citizens of the United States is hereby repealed.

"This section shall not apply to a foreign-built vessel admitted to American registry."

**Questions under other constitutional provisions are considered in the briefs. Thus the brief of the Government contains an elaborate consideration of the question whether the annual tonnage tax is an excise or a direct tax within the meaning of the Constitution. The briefs of the defendants, however, apparently concede that the tax is an excise and would be valid if it were not discriminatory and did not affect property outside the jurisdiction in violation of the Fifth Amendment. Consideration of the question whether the

(2) Does the statute conflict with the Fifth Amendment by levying taxes on property situated outside the territorial jurisdiction of the United States?

(3) Was the annual tax properly leviable on September 1, 1909?

(4) How far is it necessary to show actual use of the yachts during the year prior to September 1, 1909?

(5) Can the owner of a foreign built yacht acquire immunity under an earlier treaty which will exempt him from the operation of the statute?

With respect to the first question: It is pointed out by the defendants that the test of the application of the statute is (1) the place of origin of the yacht and (2) the citizenship of the owner or charterer and it is contended that the "due process of law" clause of the Fifth Amendment requires Congress, if it desire to tax yachts, to make an enactment of an essentially different nature applicable to all yachts of similar character and whether owned by citizens or resident aliens. It is urged, in support of this contention, that there is no real difference between the use of a foreign built yacht and the use of a similar vessel built in the United States; nor between the use of such a vessel by a citizen and by a resident alien, and that the classifications made by the statute are arbitrary, discriminatory and without any reasonable basis.

On the other hand it is stated by the Government that the object which Congress sought to accomplish was the protection of American shipbuilders, and the promotion of American shipbuilding by forcing American citizens to buy yachts built in this country. And as it is not obvious how taxing the use of foreign built yachts already purchased would promote American industries, it is said that Congress made the statute applicable to past purchases in order that the owners of all foreign-built yachts should be taxed equally.

If the validity of this legislation depended upon satisfying this

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tax is a direct tax is, therefore, unnecessary in this opinion, although by omitting to discuss it I would not seem to indicate that I have any doubt that the Government's contention in the matter is correct.

One of the defendants raises another constitutional question by contending that the thirty-five per cent. ad valorem duty which the owners of foreign-built yachts have the privilege of paying in lieu of the annual tonnage tax, is a direct tax and is invalid because not apportioned among the States. This contention is at least doubtful. The owner is not required to pay this duty. He is merely given the option of paying it. In its nature it would seem to be a duty on imports and such duties are not held to be direct taxes requiring apportionment. But it is unnecessary to pass upon this question. These actions are for the recovery of the annual tonnage tax and the validity of the ad valorem tax is not involved. The provisions concerning that tax are separable from those concerning the annual tax. The one is not dependent upon the other and there is no indication that Congress would not have adopted the one without the other. Under such conditions it is well settled that unconstitutional provisions may be separated from legal provisions and effect be given to the latter.

Court of its wisdom, fairness and justness, other reasons and facts than those thought necessary to be included in the Government's brief would be required. But as the Supreme Court has said (District of Columbia v. Brooke, 214 U. S. 138) "the courts cannot be made a refuse from ill advised, unjust or oppressive laws." The only inquiry to be considered here is whether this statute de-
20 prived these defendants of their property without due process of law.

"Due process of law"—guaranteed in both the Fifth and Fourteenth Amendments to the Constitution—means the law of the land. The guaranty implies the administration of equal laws according to established rules by competent tribunals having jurisdiction and proceeding upon notice and hearing. It affects the operations of the different departments of the government. It prevents arbitrary executive action. It applies to judicial proceedings and requires orderly procedure. It operates against confiscatory legislative enactments. It safeguards the rights of the citizen even in the exercise of the paramount rights of the state.

The power of taxation is a paramount right incident to the sovereignty of every state and is exercised by the legislative department of the government. It rests upon the theory that the public welfare requires the sacrifice of private rights and that the value of taxes exacted from the citizen is returned to him in the benefits conferred by the government. The power to tax is broad. Chief Justice Marshall said in McCulloch v. Maryland, 4 Wheat. 316:

"The people of a State, therefore, give to their government a right of taxing themselves and their property, and as the exigencies of government cannot be limited, they prescribe no limits to the exercise of this right, resting confidently on the interest of the legislator, and on the influence of the constituent over their representatives, to guard them against its abuse."

21 But broad as is the taxing power of the federal government, there are constitutional limitations attached to its exercise. The special restraints imposed by the Constitution are that no capitation or direct tax shall be laid without apportionment; that no tax or duty shall be laid upon any article exported from a State, and that "all duties, imports and exercises shall be uniform throughout the United States." (Const. Art. 1, sec. 8, pa. 1; sec. 9, pars. 4 and 5.) There are also undoubtedly general limitations imposed by the due process of law clause of the Fifth Amendment. Due process of law requires at least the exercise of the taxing power only for public purposes and regularity in the processes for the assessment and collection of taxes.*

These defendants, however, as I have already indicated, contend for a far broader application of the due process clause than that just

*There will be occasion later to consider how far the principle that the due process clause in the Fourteenth Amendment prevents a State from taxing property located outside its territorial jurisdiction applies in the consideration of Acts of Congress in relation to the Fifth Amendment.

pointed out, and in effect, urge that this Court should declare the statute in question unconstitutional, because the selection for taxation of the use of foreign-built yachts is arbitrary and discriminatory. They say that that which is essential to due process of law in taxation, whether by the nation or the state, is "that a tax law must apply impartially to all persons in the same class, that is, similarly situated, and that it must operate equally and uniformly upon all persons in like circumstances and under like conditions.

22 If the Fifth Amendment were as broad as the Fourteenth, there would be more ground for these contentions of the defendants. But the Fourteenth Amendment differs from the Fifth Amendment in that in addition to the "due process of law" clause, it contains the provision that no State shall "deny to any person within its jurisdiction the equal protection of the laws." This provision is directly aimed at discriminatory legislation. Its object is to secure equality and generality in State statutes. Under this clause many decisions, both federal and state, have been rendered holding different state enactments unconstitutional as lacking the character of generality and as containing discriminatory classifications. The Supreme Court of the United States, however, has never held that the equality clause adds nothing to the scope of the Fourteenth Amendment so that decisions under it have controlling force in determining the application of the Fifth. It is true that it seems to be assumed by text writers and that there are dicta in the decisions to the effect that discriminatory legislation is as much in conflict with the due process clause as with the equality clause. But however this may be with respect to the exercise of other powers, I am satisfied that in the exercise of the taxing power, so long as Congress follows the particular constitutional provisions relating to the levying of taxes, there are no limitations upon its right to discriminate in selecting the subjects of taxation.

23 In McCray 1. United States, 195 U. S. 27, in sustaining the validity of the Oleomargarine Act, the Supreme Court, through the present Chief Justice, said (pp. 59, 61, 63):

"Since, as pointed out in all the decisions referred to, the taxing power conferred by the Constitution knows no limits except those expressly stated in that instrument, it must follow, if a tax be within the lawful power, the exertion of that power may not be judicially restrained because of the results to arise from its exercise." * * *

"Whilst undoubtedly both the Fifth and Tenth Amendments qualify, in so far as they are applicable, all the provisions of the Constitution, nothing in those amendments operates to take away the grant of power to tax conferred by the Constitution upon Congress. The contention on this subject rests upon the theory that the purpose and motive of Congress in exercising its undoubted powers may be inquired into by the courts, and the proposition is therefore disposed of by what has been said on that subject." * * *

"Conceding merely for the sake of argument that the due process clause of the Fifth Amendment, would avoid an exertion of the taxing power which, without any basis for classification, arbitrarily taxed one article and excluded an article of the same class, such

concession would be wholly inapposite to the case in hand. The distinction between natural butter artificially colored, and oleomargarine artificially colored so as to cause it to look like butter, has been pointed out in previous adjudications of this court. * * * That provision [the Fifth Amendment], as we have previously said, does not withdraw or expressly limit the grant of power to tax conferred upon Congress by the Constitution. From this it follows, as we have also previously declared, that the judiciary is without authority to avoid an act of Congress exerting the taxing power, even in a case where to the judicial mind it seems that Congress had in putting such power in motion abused its lawful authority
24 by levying a tax which was unwise or oppressive, or the result of the enforcement of which might be to indirectly affect subjects not within the powers delegated to Congress."

And in the very recent case of District of Columbia v. Brooke, 214 U. S. 138, 149, Mr. Justice McKenna, said:

"The other objections expressed the same fundamental idea, to wit, that the act discriminates between resident and non-resident owners of property, and because it does it is void. * * *

"The defendant in error asserts this discrimination and argues its consequences at some length, but does not refer to any provision of the Constitution of the United States which prohibits Congress from enacting laws which discriminate in their operation between persons or things. If there is no express prohibition of such power, may prohibition be implied from our form of government? Upon that proposition we need not express an opinion. If prohibition exists it must rest on all the powers conferred by the Constitution. This Court, however, has just held, in the case of United States v. Delaware & Hudson Co., 213 U. S. 366, that Congress may, in the exercise of the powers to regulate commerce among the States, discriminate between communities and between carriers engaged in such commerce. And it was said that the assertion that 'injustice and favoritism' might 'be operated thereby,' could 'have no weight in passing upon the question of power.' In the case at bar we are dealing with an exercise of the police power, one of the most essential of powers, at times the most insistent, and always one of the least limitable of the powers of government."*

25 It is clear that Congress, in enacting the statute in question, acted within all the limitations of the Constitution regulating the exercise of the taxing power. As we have seen, the tax is an excise and not a direct tax. It also possesses the uniformity required by the constitutional provision. It is assessed equally on all citizens throughout the United States who own or charter foreign built yachts. It is geographically uniform and that which the Constitution prescribes is geographical and not intrinsic uniformity. This principle has been consistently adhered to in a series of de-

*The Court further said in this opinion that while it was not necessary to decide whether Congress had, broadly considered, the power to discriminate, no stricter limitation upon its power was possible, in any event, than that imposed upon the States by the Fourteenth Amendment.

cisions: Patton v. Brady, Executrix, 184 U. S. 608; Knowlton v. Moore, 178 U. S. 41; Pollock v. Farmers' Loan & Trust Co., 157 U. S., 429; Head Money Cases, 112 U. S. 580; United States v. Singer, 15 Wall. 111.

The statute, then, being in accord with all the special constitutional limitations, I should be unable to hold it in violation of the Fifth Amendment even if I were of the opinion that there exists no fair and reasonable basis for the discrimination which it makes between the owners of foreign and home-built yachts, and even if I were of the opinion that a similar discrimination would bring a state statute into conflict with the Fourteenth Amendment. It is my opinion that Congress had the right to select a certain class of property, to wit, foreign-built yachts, and to tax the use thereof by all citizens owning or chartering the same, and that such a tax law cannot be set aside by the courts because it is held to be unreasonably discriminatory. But it is unnecessary to go so far in
26 order to decide this case. Whatever may be said of the justness of the statute, it cannot be said that the discrimination which it makes against citizens owning foreign-built yachts, is without any substantial basis. Taxing the use of foreign-built yachts may tend, in some degree, to protect and promote American shipbuilding. Citizens stand in a position different from aliens, whether resident or non-resident. Regarding the statute from any point of view I cannot say that it is unconstitutional class legislation.

The next inquiry is whether the statute conflicts with the due process of law clause by levying taxes on property outside the jurisdiction of the United States.

The answers of the defendants Goelet and Bennett allege that their yachts were not within the jurisdiction of the United States for several years prior to the passage of the statute and that each had acquired a permanent situs in a foreign country. The Answer of the defendant Goelet further alleges that she was and is domiciled in France, and is a resident of that country.

The first question raised by the demurrers to these answers is a constitutional one; the second, one of interpretation. Assuming that the statute applies to the yachts of these defendants, is it constitutional? Should it be so construed as to apply to them?

The constitutional question presented is, as already stated, another phase of that just considered, viz.: the relation of the due process clause to this statute. If it be unconstitutional as taxing
27 property outside the jurisdiction of the United States, it is so because the levy of a tax upon such property denies due process of law to the owner thereof.

As we have seen, the theory upon which taxes are levied is that the taxpayer receives back in benefits from the government the value of the taxes exacted from him. Theoretically, the benefit received should be in exact proportion to the obligation imposed. As a corollary to these propositions it is held that the power of the State to impose taxes is limited to property within the territorial jurisdiction, because only with respect to such property is the state in a position to afford the protection and benefit due as a consideration for the tax imposed. These principles are clearly stated in the

opinion of Mr. Justice Brown in Union Transit Co. v. Kentucky, 199 U. S. 194, 202, 204:

"The power of taxation, indispensable to the existence of every civilized government, is exercised upon the assumption of an equivalent rendered to the taxpayer in the protection of his person and property, in adding to the value of such property, or in the creation and maintenance of public conveniences in which he shares, such, for instance, as roads, bridges, sidewalks, pavements, and schools for the education of his children. If the taxing power be in no position to render these services or otherwise to benefit the person or property taxed, and such property be wholly within the taxing power of another State, to which it may be said to owe an allegiance, and to which it looks for protection, the taxation of such property within the domicil of the owner partakes rather of the nature of an extortion than a tax, and has been repeatedly held by this court to be
28 beyond the power of the legislature and a taking of property without due process of law. * * *

"It is also essential to the validity of a tax that the property shall be within the territorial jurisdiction of the taxing power. Not only is the operation of state laws limited to persons and property within the boundaries of the State, but property which is wholly and exclusively within the jurisdiction of another State, receives none of the protection for which the tax is supposed to be the compensation."

In the application of these principles distinctions are necessarily drawn according to the different kinds of property. Real estate is taxed at its actual situs, irrespective of the owner's domicil. The maxim mobila sequuntur personam may determine the situs of intangible personal property for purposes of taxation. But in respect of tangible personal property the law of the owner's domicil has yielded to the law of the place where the property is kept and used. So far, at least, as the States are concerned, tangible personal property may be regarded as separated from its owner and may be taxed where located although that may not be the place of the owner's residence or domicil. And the converse of the proposition is equally true, that such property outside the boundaries of the state may not be subjected to taxation there.*

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*The lex situs rule with respect to tangible personal property should be stated in modified form when considering vessels registered under the laws of the United States when incidentally or temporarily in a state other than that of their home port. As said by the Supreme Court in Pullman's Car Co., v. Pennsylvania, 141 U. S. 18, 23:

"Ships or vessels, indeed, engaged in interstate or foreign commerce upon the high seas, or other waters which are a common highway, and having their home port, at which they are registered under the laws of the United States at the domicil of their owners in one State, are not subject to taxation in another State at whose ports they incidentally and temporarily touch for the purpose of delivering or receiving passengers or freight. But that is because they are not, in any proper sense, abiding within its limits, and have no continuous presence or actual situs within its jurisdiction, and, therefore, can be taxed only at their legal situs, their home port and the domicil of their owners."

29 Upon these principles it is clear that foreign-built yachts having a permanent situs in a state other than that of their owners' domicil are with respect to state legislation subject to the lex situs rule. Such vessels are not entitled to be registered or enrolled, and can only become "vessels of the United States" by special acts of Congress. They stand for the purposes of taxation in the same position as other tangible personal property. A state tax upon a foreign-built yacht used only in another state or in foreign waters would unquestionably be invalid, irrespective of the owner's residence or domicil.

The question then is whether the principles which prevent state tax legislation from having extra territorial force apply in the same degree to federal legislation. The underlying principle, as we have seen, is that taxes are the consideration for protection afforded, and it is contended by the Government that while state tax laws may be invalid as affecting property outside the state because the state is powerless to furnish protection, yet that a national enactment cannot fail for that reason because the United States Government has power to afford protection to the persons and property of its citizens abroad.

30 It is said that an independent nation has power to protect property beyond its territorial limits which no component part of that nation can have and, consequently, that limitations upon the taxing power of the states have no necessary effect upon the validity of the present statute.*

I think it the better view that these contentions of the Government are correct. The national government has a far-reaching arm. It may afford in many ways protection to the property of its citizens located in foreign countries. In case of injury it may demand indemnity from other nations. Congress has already enacted laws with respect to the issue of certificates of ownership and passports to unregistered vessels owned by citizens (R. S. Secs. 4190, 4308) which might afford some protection in foreign countries, and it has, unquestionably, power to enact laws of much broader scope. I should be unable to hold that legislation clearly and unequivocally imposing taxes upon foreign-built yachts owned by citizens and located in foreign countries would be unconstitutional because by reason of the inability of the United States to afford protection to such property, there would be no consideration for the payment of such taxes, and the owner would be, consequently, deprived of his property without due process of law.

But such a tax would be extraordinary in its nature. If imposed it should be by clear and express enactment. It

31 ought not to depend upon any doubtful construction. If Congress desire to exercise the power of the national govern-

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*When, however, even a registered vessel has a continuous presence—an actual situs—in a state other than that of the owner's domicil or port of register, it is subject to taxation there. Old Dominion Steamship Co. v. Virginia, 198 U. S. 299; Hays v. Pacific Mail Steamship Co., 17 How. 596; see also Ayer & Lord Co. v. Kentucky, 202 U. S. 409; St. Louis v. The Ferry Co., 11 Wall. 423.

ment to go beyond its territorial jurisdiction in levying taxes—a power inherent in the United States because it is a nation and more than a state—it ought to employ language leaving no doubt as to its intention. The presumption should be that a tax law applies only to subjects within the territorial jurisdiction. Although Congress might provide for the grant of documents to foreign-built yachts owned by citizens which would have great protective value the steps which it has taken in that direction have been slight and the passports which it has provided for are granted only to vessels departing from the United States. The statute uses broad language, but I find nothing in it or in prior legislation clearly evidencing an intention on the part of Congress to tax the use of foreign-built yachts in foreign waters and wholly outside the limits of the United States. The provisions are, in my opinion, consistent with an intention to tax only the use of such yachts in the waters of this country. Possibly the extent of such use may be immaterial, but I think that such use, to some extent, must be shown to bring a case within the statute.*

Furthermore, whatever doubt there might be as to the application of the statute in the case of a citizen of the United States
32 residing in this country and owning a foreign-built yacht used only in foreign waters, there can be no question, in my opinion, that a citizen domiciled in a foreign country and owning such a yacht is not liable to the tax. Certainly the liability of a citizen domiciled and resident in France for the use of a foreign-built yacht in foreign waters should be established by clear and certain language, and in this case it is not only doubtful whether the statute applies to such use, but its language is inconsistent with its application to non-residents. The section in question provides that the tax shall be levied and collected "by the collector of customs nearest the residence of the managing owner." Who is the collector of customs nearest the residence of the defendant Goelet? Is it the collector of the most eastern district in Maine because that district is nearest to Paris? It seems evident from this provision alone that

*It must be clearly understood that this conclusion is reached with reference to the allegations in the Bennett and Goelet answers that the yachts belonging to these defendants have not been and are not within the jurisdiction of the United States and that each has acquired a permanent situs abroad. I construe these allegations to wholly negative use in the United States and I have no intention to hold that a yacht belonging to a resident citizen may acquire any such situs in a foreign country as will permit her owner to use her to any considerable extent in the waters of the United States without paying the tax. Whether she could be so used to any extent whatever is a question not presented by the pleadings and upon which no opinion is expressed.

I construe the allegations in the Billings case to state a substantial use partly within and partly without the waters of the United States and such use I think comes clearly within the statute.

Congress considered that it was dealing with and intended only to to deal with, yacht owners residing in this country.

The next question is whether the tax was properly leviable on September 1, 1909.

The Act went into effect on August 6, 1909. The section provides, as we have seen, that a tonnage tax "shall be levied and
33 collected annually on the first day of September * * * upon the use of every foreign built yacht * * * now or hereafter owned or chartered for more than six months."

In my opinion the six months' limitation applies only to yachts chartered. Such is the natural interpretation of the language used. It might fairly be expected that a charter should run for some extended period to subject a charterer to a tax, but no particular reason appears why continued ownership for any stated period should be required. Indeed, a requirement of six months' ownership would be a direct invitation to transfers to avoid the tax.

Does, then, the fact that less than a month elapsed between the passage of the Act and September 1, 1909, establish that the full tax was improperly levied upon that date?

It is urged by the defendants that as the tax is one upon use, it ought to have some fair relation to the actual enjoyment of the privilege taxed, and that it must have been the intention of Congress, in enacting the legislation just prior to the close of the year, to lay an annual tax upon future use and not to penalize past use, and that if a tax for past use be levied it should be apportioned according to the period of actual use prior to September 1st, 1909.

There is much force in these contentions but I think that they are not well founded. The language of the statute, speaking on
34 August 6th, 1909, is that the use of yachts "now or hereafter owned" shall be taxed on September 1st. The section says that the use of yachts owned at the time of its passage or thereafter acquired shall be taxed and, in my opinion, Congress intended that such tax should be levied on the first day of every September following the enactment of the statute. While the tax is collectible annually according to a given situation on September 1st, there is nothing in the statute to indicate that a full year's use is a prerequisite to liability, nor is there any provision for apportionment. I, therefore, hold that the tax was properly leviable on September 1st, 1909. If this construction gives the statute a retrospective operation—and I fail to see that it does—it is nevertheless adopted, because it is, in my opinion, required by the unequivocal language used.

The fourth question is as to the necessity of showing actual use of the yachts during the year prior to September 1st 1909.

One of the defendants alleges in his answer that his yacht was out of commission during the year preceeding the first of September, 1909; was laid up during that year, and was not actually used by any person.

The statute seems to distinguish between use and ownership. It imposes a novel tax—a tax on use. There is nothing by way of

precedent to aid in the determination whether Congress intended that the statute should apply only in cases where owners use their yachts for yachting purposes during the year prior to the assessment of the tax, or whether it intended that the tax should cover the privilege of using. Considering the object of the statute and
35 the reason of the matter, I think the latter interpretation the correct one, although I fully appreciate the very narrow distinction between such a tax on the privilege of using and a tax on ownership. Still, I can see no reason why Congress should distinguish between the yacht owner who chooses to put his yacht in commission and employ it as a pleasure craft, and the owner who prefers in a particular year to keep his yacht laid up. The latter has in one sense the use of his yacht, although he does not cho-se to sail it. I have already held that use by the owner for any particular length of time is not necessary to the application of the statute, and I now feel constrained to further hold that no particular kind of use is required—that a yacht owner who keeps his yacht laid up is nevertheless liable to the tax.

The final question to which it is necessary to give any extended consideration is whether the owner of a foreign-built yacht can acquire any immunity under a treaty which will exempt him from the operation of this statute.

The defendant Rainey contends that as the treaty of 1815 with Great Britain provided that no higher or other duties or charges should be imposed in the United States upon British vessels than those imposed upon vessels of the United States he—as the owner of a British-built vessel—is not subject to the statute.

This defendant does not claim to be a British subject, and it is by no means clear that he is entitled to invoke the pro-
36 tection of the treaty. But, however that may be, it is well settled that when a treaty is inconsistent with a subsequent Act of Congress, the latter will prevail. **Taylor et al. v. Morton, 2** Curtis 454; and see Whitney v. Robertson, 124 U. S. 190; Head Money Cases, 112 U. S. 580; The Cherokee Tobacco, 11 Wall. 616; Ropes v. Clinch, 8 Blatchf. 304.

Treaties are contracts between nations and by the Constitution are made the law of the land. But the Constitution does not declare that the law so established shall never be altered or repealed by Congress. Good faith toward the other contracting nation might require Congress to refrain from making any change, but if it does act, its enactment becomes the controlling law in this country. The other nation may have ground for complaint, but every person is bound to obey the law. And as a corollary it follows that no person acquires any vested right to the continued operation of a treaty.

It is now only necessary to briefly state the conclusions reached with respect to the less important questions considered upon the various briefs.

(1) I am satisfied that an action in the nature of debt will lie

against the yacht owners to enforce the collection of the tax, and that the complaints state good causes of action.*

37 (2) I am also satisfied that the section in question is not void as a bill for raising revenue originating in the Senate and not in the House of Representatives. It appears that the section was proposed by the Senate as an amendment to a bill for raising revenue which originated in the House. That is sufficient. Having become an enrolled and duly authenticated Act of Congress, it is not for this Court to determine whether the amendment was or was not outside the purposes of the original bill.

For the reasons stated, the demurrers of the Government to the answers in the Billings, Pierce and Rainey cases are sustained. The demurrers in the Bennett and Goelet cases are overruled.

(Endorsed:) U. S. Circuit Court, Southern District, N. Y. Filed Mar. 8, 1911. John A. Shields, Clerk.

38 *Order Sustaining Demurrer.*

At a Stated Term of the United States Circuit Court for the Southern District of New York, held in the United States Court House and Post-Office Building, in the Borough of Manhattan, City of New York, on the 16th day of March, 1911.

Present: Hon. Walter C. Noyes, Judge.

UNITED STATES OF AMERICA, Plaintiff,
against
CORNELIUS K. G. BILLINGS, Defendant.

The issues of law raised by the demurrer of the plaintiff to the answer of the defendant herein, having duly come on to be heard by this Court at a stated term thereof, held in the United States Post Office and Court House Building in the Borough of Manhattan, City of New York, on the 10th day of February, 1911.

Now, after hearing Addison S. Pratt, Esq., Assistant United States Attorney, of counsel for the plaintiff in support of the said demurrer, and William D. Guthrie, Esq., of counsel for the defendant in opposition thereto, and due deliberation having been had

*The defendants in these cases are liable as owners of the yachts. Why they should be described in the complaints as "managing owners" is not apparent. The only reference to managing owners in the statute seems to be for the purpose of fixing the jurisdiction of the collector of customs in cases where there are several part owners. Still, a sole owner is undoubtedly the managing owner of his yacht and there is no contention but that these defendants are the sole owners of their yachts. Consequently I think the presence of the word "managing" should not be held to affect the sufficiency of the complaint.

thereon, it is upon motion of Henry A. Wise, United States Attorney for the Southern District of New York, attorney for the plaintiff.

Ordered that the demurrer of the plaintiff to the answer
39 herein be and the same hereby is sustained and that the plaintiff have final judgment against the defendant for the relief demanded in the amended complaint herein, together with its cost to be taxed by the Clerk of this Court.

WALTER C. NOYES,
U. S. Circuit Judge.

Copy Received. Mar. 14, 1911, Guthrie, Bangs & Van Sinderen.—U. S. Circuit Court, Southern District N. Y. Filed Mar. 16, 1911. John A. Shields, Clerk.

40 *Order Denying Application for Interest.*

At a Stated Term of the United States Circuit Court, held in and for the Southern District of New York, at the United States Court and Post Office Building, Borough of Manhattan, City of New York, on the 7th day of July, 1911.

Present: Hon. Walter C. Noyes, Judge.

UNITED STATES OF AMERICA, Plaintiff,
vs.
CORNELIUS K. G. BILLINGS, Defendant.

An application having heretofore been made to this Court by the plaintiff above named for the allowance of interest from the first day of September, 1909, on the amount of the tonnage tax sued for herein, as demanded in the complaint, and opposition thereto having been made by the defendant,

Now after hearing Addison S. Pratt, Esq., Assistant United States Attorney for the Southern District of New York, of counsel for the plaintiff, in support thereof, and Francis, S. Bangs, Esq., of counsel for the defendant, in opposition thereto, and due deliberation having been had thereon, on motion of Guthrie, Bangs & Van Sinderen, attorneys for the defendant, it is

Ordered that the application of the plaintiff that it be allowed interest on the amount of the tonnage tax sued for herein be, and it hereby is denied.

WALTER C. NOYES,
U. S. Circuit Judge.

(Endorsed:) U. S. Circuit Court, Southern District N. Y. Filed Jul- 13, 1911. John A. Shields, Clerk.

41 *Judgment.*

United States Circuit Court, Southern District of New York.

UNITED STATES OF AMERICA, Plaintiff,
against
CORNELIUS K. G. BILLINGS, Defendant.

The issues of law raised by the demurrer of the plaintiff to the answer of the defendant herein having duly come on to be heard by this Court at a Stated Term thereof held at the United States Post-Office Building in the Borough of Manhattan, City of New York, on the 10th day of February, 1911, and an order having been entered herein sustaining the said demurrer and directing that the plaintiff have final judgment against the defendant for the relief demanded in the amended complaint herein with costs.

Now on motion of Henry A. Wise, United States Attorney for the Southern District of New York, attorney for the plaintiff, it is

Ordered and adjudged that the plaintiff recover against the defendant the sum of $7,644, without interest, together with
42 its costs and disbursements to be taxed by the Clerk of this Court, and amounting as taxed to the sum of $54.52, and amounting in all to the sum of $7,698.52, and that the plaintiff have execution therefor.

Dated New York, July 13th, 1911.

Judgment signed this 13th day of July, 1911.
JOHN A. SHIELDS, *Clerk.*

(Endorsed:) U. S. Circuit Court, Southern District, N. Y. Filed Jul- 13, 1911. John A. Shields, Clerk.

43 Circuit Court of the United States, Southern District of New York.

UNITED STATES OF AMERICA, Plaintiff,
against
CORNELIUS K. G. BILLINGS, Defendant.

Assignment of Errors.

The defendant in this action, in connection with his petition for a writ of error, assigns for error the following:

First. The court erred in sustaining the demurrer of the plaintiff to the defendant's answer and in entering judgment accordingly.

Second. The court erred in ruling that the defendant's yacht was subject to the tax laid under section 37 of the Act of August 5, 1909 (c. 6, 39 Stat. 11).

Third. The court erred in holding that the first levy of the tax under the said Act should be as of the 1st day of September, 1909,

and in refusing to hold that the first levy of the tax under the said Act should be as of the 1st day of September, 1910.

Fourth. The court erred in holding that although the said tax is an annual tax on use it should not be apportioned so as to tax only use after the enactment of the statute.

Fifth. The court erred in holding that the said Act did not conflict with the requirement of due process of law contained in the Fifth Amendment to the Constitution of the United States.

44 Wherefore, the defendant prays that the judgment of the said Circuit Court be reversed.

GUTHRIE, BANGS & VAN SINDEREN,
Attorneys for Defendant.

Office and Post Office Address, 44 Wall Street, Borough of Manhattan, City of New York.

A copy of the within paper has been this day received at this office, Jul- 13, 1911, Henry A. Wise, U. S. Attorney.—U. S. Circuit Court, Southern District N. Y. Filed Jul- 13, 1911. John A. Shields, Clerk.

45 *Bond.*

United States Circuit Court, Southern District of New York.

Action # 1.

UNITED STATES OF AMERICA, Complainant,
against
CORNELIUS K. G. BILLINGS, Defendant.

Know all men by these presents:

That the Fidelity and Deposit Company of Maryland, a surety corporation duly authorized to transact business under the Act of Congress approved August 13th, 1894, having an office at No. Two Rector Street in the Borough of Manhattan, City of New York, is held and firmly bound unto the United States of America in the full and just sum of Eight thousand Dollars, ($8,000.00,) lawful money of the United States to be paid to the said United States of America for which payment well and truly to be made the said Fidelity and Deposit Company of Maryland binds itself, its successors and assigns firmly by these presents.

Sealed with its corporate seal. Dated this thirteenth day of July, one thousand nine hundred and eleven.

Whereas lately at a Circuit Court of the United States for the Southern District of New York in a suit depending in said Court between the Complainant and Defendant herein above named, a final judgment was rendered against the said Cornelius K. G. Billings, and the said Cornelius K. G. Billings having obtained a Writ of Error and filed a copy thereof in the Clerk's Office of the said Court to reverse the judgment in the aforesaid suit and a citation

directed to the said United States of America citing and ad-
46 monishing it to be and appear at a session of the Supreme Court of the United States to be holden at the City of Washington.

Now the condition of the above obligation is such that if the said Cornelius K. G. Billings shall prosecute his said appeal to effect and answer all damages and costs if he fail to make his said plea good then the above obligation to be void, otherwise to remain in full force and effect.

FIDELITY AND DEPOSIT COMPANY
OF MARYLAND.
CHARLES V. R. MARSH,
Attorney-in-Fact.

Attest:
[SEAL.] JAMES R. KINGSLEY, *Attorney.*

(Statement of Surety Company attached.)

Approved as to form and also as to sufficiency of sureties, with reservation, however, to the defendant in error, of the right at any time to examine the proper officers of the Surety Company under oath, touching its assets, liabilities and financial condition generally.

WALTER C. NOYES,
U. S. Circuit Judge.

U. S. Circuit Court, Southern District, N. Y. Filed Jul- 13, 1911. John A. Shields, Clerk.

47 *Citation.*

THE UNITED STATES OF AMERICA, *ss:*

To the United States of America, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, to be holden at the City of Washington, on the 12th day of August, 1911 next, pursuant to a writ of error filed in the Clerk's office of the Circuit Court of the United States for the Southern District of New York, wherein Cornelius K. G. Billings is the plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and speedy justice be done to the parties in that behalf.

Given under my hand at the Borough of Manhattan, in the City of New York, in the District and Circuit above named, this 13th day of July in the year of our Lord one thousand nine hundred and eleven, and of the Independence of the United States the one hundred and thirty-sixth.

WALTER C. NOYES,
Judge of the Circuit Court of the United States
for the Southern District of New York.

48 [Endorsed:] Law 4/157. E. & A. D. 3266. Supreme Court of the U. S. Cornelius K. G. Billings, Plaintiff in Error, against United States of America, Defendant in Error. Citation. William D. Guthrie, Attorney for Plaintiff in Error, 44 Wall Street, New York City. A copy of the within paper has been this day received at this office. Jul- 13, 1911. Henry A. Wise, U. S. Attorney. U. S. Circuit Court, Southern District, N. Y. Filed Jul- 13, 1911. John A. Shields, Clerk.

[Endorsed:] United States Supreme Court. Cornelius K. G. Billings, Pl'ff in Error, vs. United States of America, Def't in Error. Transcript of Record.

Endorsed on cover: File No. 22,815. S. New York, C. C. U. S. Term No. 66. Cornelius K. G. Billings, plaintiff in error, vs. The United States. Filed July 25th, 1911. File No. 22,815.

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1913.

No. 67.

CORNELIUS K. G. BILLINGS, PLAINTIFF IN ERROR,

vs.

THE UNITED STATES.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

FILED JULY 25, 1911.

(22,816)

(22,816)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1913.

No. 67.

CORNELIUS K. G. BILLINGS, PLAINTIFF IN ERROR,

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THE UNITED STATES.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

INDEX.

	Original.	Print
Petition for writ of error	1	1
Order allowing writ	2	1
Writ of error	3	2
Clerk's certificate	4	3
Summons	6	3
Complaint	7	4
Answer	12	6
Stipulation waiving jury trial	16	8
Opinion, Hough, D. J	17	9
Findings of fact and conclusions of law	31	18
Defendant's exceptions	37	22
Judgment	38	22
Bill of exceptions	40	23
Offers by the Government	40	23
Government Exhibit 1—Bill of sale	41	24

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JULY 8, 1913.

	Original.	Print
Government Exhibit 2—Letter, Billings to Commissioner of Navigation, April 24, 1909, &c.	44	26
Motion to dismiss denied	45	26
Testimony of Thomas Farrington for defendant	46	27
Defendant's Exhibit 3—Movement of the yacht "Vanadis" from September 1, 1909, to September 1, 1910	47	27
Testimony of Fred Schlosser	49	29
Motion to dismiss renewed, &c.	50	30
Judge's certificate to bill of exceptions	52	31
Assignment of errors	54	32
Bond	55	32
Citation	57	33

1 Circuit Court of the United States for the Southern District of New York.

At Law. Action No. 2.

UNITED STATES OF AMERICA, Plaintiff,
against
CORNELIUS K. G. BILLINGS, Defendant.

Petition for Writ of Error.

And now comes Cornelius K. G. Billings, defendant herein, and says: That on or about the 13th day of July, 1911, the Circuit Court of the United States for the Southern District of New York entered a judgment herein in favor of the plaintiff and against this defendant, in which judgment and the proceedings had prior thereto in this cause, certain errors were committed to the prejudice of this defendant, all of which will more in detail appear from the assignment of errors which is filed with this petition.

Wherefore, this defendant prays that a writ of error may issue in this behalf out of the Supreme Court of the United States for the correction of errors so complained of, and that a transcript of the record, proceedings and papers in this cause, duly authenticated, may be sent to the Supreme Court of the United States.

WILLIAM D. GUTHRIE,
Attorney for Defendant, 44 Wall Street,
New York City, N. Y.

A copy of the within paper has been this day received at this office, Jul. 13, 1911.

HENRY A. WISE,
U. S. Attorney.

U. S. Circuit Court, Southern District N. Y. Filed Jul. 13, 1911. John A. Shields, Clerk.

2 *Order Allowing Writ of Error and Supersedeas.*

Circuit Court of the United States for the Southern District of New York.

At Law. Action No. 2.

UNITED STATES OF AMERICA, Plaintiff,
against
CORNELIUS K. G. BILLINGS, Defendant.

This 13th day of July, 1911, comes the defendant, by William D. Guthrie, his attorney, and files herein and presents to the court his

petition praying for the allowance of a writ of error, and an assignment of errors intended to be urged by him, praying also that a transcript of the record and proceedings and papers upon which the judgment herein was rendered, duly authenticated, may be sent to the Supreme Court of the United States, and that such other and further proceedings may be had as are proper in the premises.

On consideration whereof the court does allow the writ of error upon the defendant's giving bond according to law in the sum of Eight Thousand dollars ($8,000.00) which shall operate as a supersedeas bond.

WALTER C. NOYES,
United States Circuit Judge.

(Endorsed:) A copy of the within paper has been this day received at this office, Jul. 13, 1911. Henry A. Wise, U. S. Attorney.—U. S. Circuit Court, Southern District N. Y. Filed Jul. 13, 1911. John A. Shields, Clerk.

3 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Judges of the Circuit Court of the United States for the Southern District of New York, Greeting:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the Circuit Court, before you, or some of you, between the United States of America, plaintiff, and Cornelius K. G. Billings, defendant, a manifest error hath happened, to the great damage of the said Cornelius K. G. Billings as is said and appears by his complaint, we, being willing that such error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at the City of Washington on the 12th day of August, 1911, in said Supreme Court, to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein, to correct that error, what of right and according to the law and custom of the United States ought to be done.

Witness, the Honorable Edward D. White, Chief Justice of the Supreme Court of the United States, this 13th day of July, in the year of our Lord one thousand nine hundred and eleven,
4 and of the Independence of the United States the one hundred and thirty-sixth.

JOHN A. SHIELDS,
Clerk of the Circuit Court of the United States of America for the Southern District of New York, in the Second Circuit.

The foregoing writ is hereby allowed.

WALTER C. NOYES,
U. S. Circuit Judge.

UNITED STATES OF AMERICA,
Southern District of New York, ss:

I, John A. Shields, Clerk of the Circuit Court of the United States of America, for the Southern District of New York, in the Second Circuit, by virtue of the foregoing Writ of Error, and in obedience thereto, do hereby certify, that the pages numbered from one to 58 inclusive, contain a true and complete transcript of the record and proceedings had in said Court in the cause of Cornelius K. G. Billings, Plaintiff in Error, vs. United States of America, Defendant in Error, as the same remain of record and on file in said office.

In testimony whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, in the Second Circuit, this — day of July, in the year of our Lord one thousand nine hundred and eleven and of the Independence of the United States the one hundred and thirty-sixth.

JOHN A. SHIELDS, *Clerk.*

5 [Endorsed:] Law. 6, 124. E. & A. D. 3267. Cornelius K. G. Billings, Plaintiff-in-Error, against United States of America, Defendant-in-Error. Action No. 2. Writ of Error. William D. Guthrie, Attorney for Plaintiff-in-Error, 44 Wall Street, New York City. A copy of the within paper has been this day received at this office. Jul- 13, 1911. Henry A. Wise, U. S. Attorney. U. S. Circuit Court, Southern District N. Y. Filed Jul- 13, 1911. John A. Shields, Clerk.

6 United States Circuit Court, Southern District of New York.

Action #2.

UNITED STATES OF AMERICA, Plaintiff,
against
CORNELIUS K. G. BILLINGS, Defendant.

Summons.

To the above-named defendant:

You are hereby summoned to answer the complaint in this action and to serve a copy of your answer on the plaintiff's attorney within twenty days after the service of this summons, exclusive of the day of service; and in case of your failure to appear, or answer, judgment will be taken against you by default for the relief demanded in the complaint.

Witness, the Honorable Edward D. White, Chief Justice of the United States, at the Borough of Manhattan in the City of New York, this 19th day of January, in the year one thousand nine hundred and eleven.

[L. S.] JOHN A. SHIELDS, *Clerk.*

HENRY A. WISE,
U. S. Attorney, Plaintiff's Attorney,
Office and Post-office Address, Room 50, U. S. Court and P. O. Building, Borough of Manhattan, New York City.

7 United States Circuit Court, Southern District of New York.

Action No. 2.

UNITED STATES OF AMERICA
vs.
CORNELIUS K. G. BILLINGS.

Complaint.

The plaintiff above named, by Henry A. Wise, United States Attorney for the Southern District of New York, its attorney, for its complaint against the defendant above named, alleges, on information and belief, as follows:

First. That the plaintiff is a corporation sovereign.

Second. That the defendant is a citizen of the United States.

Third. That on the 1st day of September, 1910, the defendant was the managing owner of the yacht "Vanadis"; that the said yacht was, and is, a foreign built vessel, and that it was built in the Kingdom of Great Britain; that the said yacht had a gross tonnage of 1091.79 tons; that the said yacht had not been, and was not, used or intended to be used for trade.

Fourth. That during all the times herein mentioned the following Customs Regulation, duly promulgated and adopted according to law by the Secretary of the Treasury of the United States, was in full force and effect:

8 ART. 62. "Any foreign-built vessel purchased by a citizen, although prohibited from being documented, is nevertheless entitled to legal protection as property of a citizen.

The collector may issue to any such vessel, owned by a citizen, a certificate in proper form, of the validity and filing of the bill of sale. * * *"

Fifth. That the ownership of said yacht "Vanadis" was transferred to defendant on or about May 29, 1908, as evidenced by bill of sale bearing the same date; that said bill of sale was duly recorded in the office of the Collector of the Port of New York for the Southern District of New York on the 8th day of June, 1908, and that thereafter on the 9th day of June, 1908, pursuant to law and the Customs Regulations, a certificate was issued to the defendant in manner and substance like the standard form of such certificate which is hereto annexed, marked "Schedule A."

Sixth. That during all the times herein mentioned said certificate continued in full force and effect and the protection, privileges, immunities and advantages thereby conferred continued to be used and enjoyed by said defendant.

Seventh. That immediately upon the acquisition of said yacht by the said defendant as aforesaid, the defendant became entitled to and continuously thereafter did exercise the privilege of flying the American flag on said yacht "Vanadis."

Eighth. That on or about the 1st day of September, 1910, the

Collector of Customs at the Port of New York, that being
9 the District nearest the residence of the defendant, fixed and determined the sum of Seven thousand six hundred and forty-four dollars ($7644.00) as the sum equivalent to the tonnage tax of seven dollars ($7.00) per gross ton upon the use of the said yacht and thereby levied a tonnage tax in said amount upon the use of the same, in conformity with the Act of August 5, 1909 (U. S. Stat. 1909, p. 112).

Ninth. That the said Collector of Customs at the Port of New York gave notice to the defendant of the levy of the said tax, and demanded payment thereof on the 1st day of September, 1910, prior to the beginning of this action, but no part thereof has been paid. and the defendant has not paid a duty of thirty-five per cent (35%) ad valorem upon the said yacht, in lieu of the said tax.

Wherefore plaintiff demands judgment against the defendant for the sum of Seven thousand six hundred and forty-four dollars ($7644.00), with interest thereon from the 1st day of September, 1910, together with the costs and disbursements of this action.

HENRY A. WISE,
United States Attorney for the Southern District of New York, Attorney for the Plaintiff; Office and Post-office Address, Room 50, Post-Office Building, Borough of Manhattan, City of New York.

10 SCHEDULE A.

Form of Certificate Endorsed on Bill-of-sale of Foreign-built Vessel Purchased by a Citizen.

(Art. 62, Customs Regulations, 1908.)

CUSTOM HOUSE,
Port of New York:

I, —— ——, Deputy Collector of Customs for the Port of New York, in the State of New York, in the United States of America, do hereby certify that the within Bill-of-sale bearing date of —— of the —— of — tons registered tonnage, sold and transferred by —— —— of —— to —— —— of ——, is, in form and substance, valid and effective in law, and has been duly recorded in this office, and that the said —— —— is a citizen of the United States.

As witness my hand and the seal of this office, this — day of ——, in the year of our Lord ——.

—— ——,
Deputy Collector

11 STATE OF NEW YORK,
County of New York,
Southern District of New York, ss:

Addison S. Pratt, being duly sworn, deposes and says that he is an assistant to the United States Attorney for the Southern District of New York, the attorney for the plaintiff in the within entitled action; that he has read the foregoing complaint and knows the contents thereof; that the same is true of his own knowledge, except as to the matters therein stated to be alleged on information and belief, and that as to those matters he believes it to be true. That the reason why this verification is made by deponent and not by plaintiff is that plaintiff is a corporation sovereign.

That the sources of deponent's information and the grounds of his belief as to all the matters set forth in said complaint not stated upon his knowledge, are derived from communications received by him from the Collector of Customs at the Port of New York.

ADDISON S. PRATT.

Sworn to before me this 19th day of January, 1911.
[SEAL.] FREDERICK D. CAMPBELL.

(Endorsed:) U. S. Circuit Court, Southern District N. Y., Filed Jan. 20, 1911, John A. Shields, Clerk.

12 *Answer.*

United States Circuit Court, Southern District of New York.

Action No. 2.

UNITED STATES OF AMERICA, Plaintiff,
against
CORNELIUS K. G. BILLINGS, Defendant.

And now comes the defendant above-named, by Guthrie, Bangs & Van Sinderen, his attorneys, and as and for his answer to the complaint of the plaintiff, United States of America:

For a First Defense.

I. On information and belief admits that the Customs regulation alleged and quoted in paragraph "Fourth" of the complaint has been promulgated and adopted by the Secretary of the Treasury, but denies that said regulation was duly promulgated according to any Act of Congress.

II. On information and belief denies that any certificate was issued to the defendant as alleged in paragraph "Fifth" of the complaint, but admits and alleges that the substance of the form annexed to the complaint was endorsed on the original bill of sale referred to in said paragraph "Fifth."

III. On information and belief denies each and every allegation contained in paragraph "Sixth" of the complaint.

IV. Alleges on information and belief that the yacht "Vanadis" has not at any time been, and is not now registered, enrolled or documented as a vessel of the United States, and is not entitled
13 to enjoy or exercise, and has never enjoyed or exercised, any rights, privileges or protection as a vessel or yacht of the United States and has been used by the defendant outside of the waters and territorial limits or jurisdiction of the United States from time to time and at various times during the year preceding the first day of September, 1910, and was not used for six months during such year, within the waters and territorial limits or jurisdiction of the United States or elsewhere.

For a Second and Separate Defense.

V. Alleges on information and belief that at the time of the passing and approval of the Act of Congress entitled "An Act to provide revenue, equalize duties, and encourage the industries of the United States," approved August 5, 1909, and of the alleged levy of said annual tax upon the use of this defendant's said yacht, pursuant to Section 37 of said Act, there were and ever since have been in the United States, and within its jurisdiction, a large number of yachts, pleasure-boats and vessels not used or intended to be used for trade, and not foreign-built, which were then owned or chartered for more than six months by citizens of the United States, and which were and are similar to this defendant's said yacht in all substantial respects as to construction, character and nature of property, and identical with this defendant's said yacht in all respects as to use and as being personal property of citizens of the United States, but upon the use of which property so similarly situated no tax is imposed by the said act of Congress; that said act of Congress, in so far as it purports in and by section 37 thereof to direct the levy and collection of a tax upon the use of this defendant's said
14 yacht, is not a general law operating upon all citizens of the United States owning and using like property under substantially similar conditions and circumstances, and that the levy and collection from this defendant of said sum, equivalent to a tonnage tax of seven dollars per gross ton, would not constitute the levy and collection of any tax, duty, impost or excise within the true meaning of the Constitution of the United States, but would deprive this defendant of his property without due process of law, in conflict with the Fifth Article of Amendment to the Constitution of the United States.

Wherefore the defendant prays that the complaint of the United States of America in the above-entitled action be dismissed with costs.

GUTHRIE, BANGS & VAN SINDEREN,
Attorneys for the Defendant.

Office and Post-office address: 44 Wall Street, Borough of Manhattan, New York City.

UNITED STATES OF AMERICA,
Southern District of New York, ss:

Howard Van Sinderen, being duly sworn, says: That he is one of the attorneys for the defendant above-named; that the foregoing answer is true to the knowledge of deponent, except as to the matters therein stated to be alleged on information and belief, and that as to those matters he believes it to be true. That the reason why this affidavit is not made by the defendant is that the defendant is not within the Southern District of New York, wherein deponent resides; that the information derived by deponent from
15 various sources, in the course of investigations made by deponent into the matters stated in the said answer, constitute the ground of deponent's belief as to all matters not stated upon his knowledge.

HOWARD VAN SINDEREN.

Sworn to before me this 30th day of January, 1911.

[SEAL.] THOMAS C. CURTIS, JR.,
Notary Public, New York County, N. Y.

A copy of the within paper has been this day received at this office. Jan. 30, 1911, Henry A. Wise, U. S. Attorney.—U. S. Circuit Court, Southern District N. Y., Filed Jan. 30, 1911, John A. Shields, Clerk.

16 *Stipulation Waiving July Trial.*

United States Circuit Court, Southern District of New York.

UNITED STATES OF AMERICA, Plaintiff,
against
CORNELIUS K. G. BILLINGS, Defendant.

It is hereby stipulated and agreed by and between the attorneys for the respective parties hereto that this action be tried by the Court without a jury, a jury being hereby expressly waived.

Dated: New York, April 10, 1911.

HENRY A. WISE,
Attorney for Plaintiff.
GUTHRIE, BANGS & VAN SINDEREN,
Attorney for Defendant.

(Endorsed:) U. S. Circuit Court, Southern District N. Y., Filed Jul- 13, 1911, John A. Shields, Clerk.

17 Circuit Court of the United States, Southern District of New York.

No. 2.

UNITED STATES OF AMERICA
vs.
CORNELIUS K. G. BILLINGS.

No. 2.

SAME
vs.
H. CLAY PIERCE.

No. 2.

SAME
vs.
ROY A. RAINEY.

No. 2.

SAME
vs.
JAMES GORDON BENNETT.

No. 2.

SAME
vs.
HARRIET GOELET.

SAME
vs.
C. LEDYARD BLAIR.

SAME
vs.
INVESTORS' & TRADERS' REALTY CO.

Yacht Cases.

Opinion by Hough, J.

18 Actions at law tried (by consent) without a jury—and each brought to recover one year's tonnage tax under Section 37 of the Tariff Act of 1909, defendants being severally the owners of yachts admitted or alleged to be "foreign-built."

Mr. Pratt, Assistant U. S. Attorney, for plaintiff;
Mr. Bangs for defendants Billings, Bennett, Goelet and Pierce;
Mr. Andrade for defendant Rainey;
Mr. Byrne for defendant Blair;
Mr. Miller for defendant Investors' & Traders' Realty Co.

Findings of Fact.

(Billings case). Defendant is a citizen of the United States and was on September 1, 1910, the owner and managing owner of the yacht Vanadis, a foreign-built vessel of a gross tonnage of 1091.79 tons. That on or about the date last mentioned the Collector of Customs at the Port of New York levied a tax, pursuant to the act above referred to, of $7 per gross ton upon the use of the said yacht. The amount of the tax so levied and determined is $7,644. Mr. Billings is not only a citizen, but a resident of the United States and has his domicile in this country. Neither in 1909 nor 1910 did he actually use Vanadis in the sense of having her in commission for as much as six months; while in the sense that he did use her, such use was partly within and partly without the territorial jurisdiction of the United States, but when not in commission the vessel laid up in this country.

At the time of the passing of the act in question there were and ever since have been in the United States and within its jurisdiction a large number of yachts, pleasure-boats and vessels not used or intended to be used for trade and not foreign-built, which were then owned or chartered for more than six months by citizens of the United States and which were and are similar to this defendant's yacht in all substantial respects as to construction, character
19 and nature of property and identical with said defendant's yacht in all respects as to use and as being personal property of citizens of the United States.

The Vanadis was transferred to defendant on or about May 29, 1909, and her bill of sale was recorded in the office of the Collector of the Port of New York, who levied the tax in suit and whose district is nearest defendant's place of residence.

(Pierce case). Defendant is a citizen of the United States and domiciled and resident therein. On September 1, 1910 he was the owner and managing owner of the yacht Yacona, a foreign-built vessel of a gross tonnage of 526.14 tons. On or about said last mentioned date the Collector of Customs at the Port of New York levied a tax pursuant to the statute above mentioned at the rate of $7 per gross ton upon the use of said yacht, the amount of said tax being $3,682. The yacht in question was transferred to defendant on or about June 6, 1902, and her bill of sale was recorded in the office of the Collector of the Port of Boston. The Collector of the Port of New York is the Collector of the District nearest the residence of the defendant. At the time of the levying of the said tax and for a long time before, i. e. more than a year before, the Yacona was out of commission and laid up at Brooklyn, N. Y., and was not used in the sense of being navigated or put to purposes of pleasure, by the de-

fendant or anyone else, but the defendant could have used her if he had so desired.

The finding as to the existence and non-taxation of a large number of non-foreign-built yachts in the United States hereinabove made in the Billings case is repeated and found in this case.

(Bennet Case.) The defendant is a citizen of the United States, domiciled and resident in the Republic of France. On or about September 1, 1910, he was the owner and managing owner of the yacht Lysistrata, a foreign-built vessel of the gross tonnage of 1942.75 tons. On or about September 1, 1910, the Collector of Customs of the Port of New York levied a tax pursuant to the
20 statute above mentioned at the rate of $7 per ton upon the use of said yacht, and the amount of said tax was and is $13,601. Said Collector of Customs was not the Collector of the District nearest the residence of the defendant. Said yacht Lysistrata has never at any time been within the territorial jurisdiction of the United States except for brief visits of a few days, and her headquarters, usual anchorage or mooring place when not engaged on voyages is not and never has been within the waters of the United States. The same finding as to the existence and non-taxation of other yachts not foreign-built and owned or chartered by citizens of the United States as has been hereinabove made in the Billing case is made in this case.

(Goelet Case.) Defendant is a citizen of the United States, domiciled and resident in the Republic of France. On or about the first day of September 1910 she was the owner and managing owner of the yacht Nahma, a foreign-built vessel of the gross tonnage of 1739.83 tons. On or about September 1st, 1910, the Collector of Customs at the Port of New York levied a tax pursuant to the statute above mentioned at the rate of $7 per ton upon the use — said yacht, and the amount of said tax was and is $12,180. Said Collector of Customs was not the Collector of the District nearest the residence of the defendant.

Said yacht Nahma was originally purchased on or about November 30, 1896, by Robert Goelet, deceased (a citizen of the United States), and her bill of sale was recorded in the office of the Collector of Customs of the Port of New York. Upon the decease of Mr. Goelet his executors conveyed the said yacht to defendant by a bill of sale which was likewise recorded in the office of said Collector of Customs. The Nahma has not been in the territorial jurisdiction of the United States since 1901, and when not in commission she has laid up at Greenock, Scotland. The finding as to the existence and non-taxation of a large number of foreign-built yachts in the United States hereinabove made in the Billings case is repeated and found in this case.

(Rainey case). Defendant is a citizen of the United States
21 domiciled and resident therein. On September 1, 1910, he was the owner and managing owner of the yacht Cassandra, a foreign-built vessel of a gross tonnage of 1227.17 tons. On or about said last mentioned date the Collector of Customs at the Port of New York levied a tax pursuant to the statute above mentioned

at the rate of $7 per gross ton upon the use of said yacht, the amount of said tax being $8,589. The yacht in question was transferred to the defendant on or about the 25th of June, 1908, and her bill of sale was recorded in the office of the Collector of the Port of New York. The Collector of the Port of New York is the Collector of the District nearest the residence of the defendant. At the time of the levying of the said tax and for a long time before, i. e., more than a year before, the Cassandra was out of commission and laid up at New London, Conn., and there is no evidence that during that time or at any time since was the vessel navigated or put to purposes of pleasure by the defendant or any one else, but defendant could have used her if he had so desired.

The findings as to the existence and non-taxation of a large number of foreign-built yachts in the United States hereinabove found in the Billings case is repeated and found in this case.

(Blair case.) Defendant is a citizen of the United States and domiciled and resident therein. On September 1, 1909, he was the owner and managing owner of the yacht Diana, a vessel of a gross tonnage of 785.6 tons. On or about said last mentioned date the Collector of Customs at the Port of New York assumed to levy a tax alleged to be pursuant to the statute above mentioned at the rate of $7 per gross ton upon the use of the said yacht, the amount of said tax being $5,502.

The yacht Maria was built in Glasgow, Scotland, in 1896; in 1902 she was sold to an American citizen, who re-named her the Delaware; he used her as a pleasure vessel until 1905. During Mr. Bourne's ownership of her approximately $30,000 was spent in im-
22 proving and bettering the Delaware, said expenditures being exclusive of those payments properly chargeable to maintenance or upkeep. In February, 1905, while lying at Hoboken, N. J., the Delaware was burned, most of her upper works being totally destroyed, her engines so injured that they had to be dismantled, and her steel plating badly warped. So much water was pumped into her to put out the fire that she sank, though apparently there was not enough water at her berth to permit her to go out of sight. The wreck passed into the hands of Mr. Chubb, apparently as agent for underwriters. That gentleman raised and rebuilt the yacht at an expense of approximately $86,000, and he renamed the re-built vessel Diana. In 1906 Mr. Chubb sold the Diana to the defendant, and between the date of his purchase and the date of levying the tax Mr. Blair has expended on the Diana for betterments and improvements approximately $34,000. Exclusive of salvage, the actual expenditures for rebuilding of and improvements upon the wrecked Delaware amount to approximately $121,000, and Mr. Chubb paid for the wreck $35,500 after, as above noted, Mr. Bourne had expended for new construction on the Delaware, about $30,000.

At the time of the action aforesaid by the Collector of the Port of New York the defendant was a resident of Peapack, N. J., and there had his domicile, being also a citizen of the State of New Jersey. The Collector of the Port of New York is not the collector of the District nearest the residence of the defendant. The bill of sale

from Mr. Chubb to defendant was recorded in the office of the Collector of the Port of New York. Defendant has largely used the Diana within the territorial jurisdiction of the United States as well as in foreign waters. The finding as to the existence and non-taxation of a large number of non-foreign built yachts in the United States hereinabove made in the Billings case is repeated and found in this case.

(Investors' & Traders' Realty Co. Case.) Defendant is a
23 citizen of the United States and is a corporation whose "residence" is nearest the collection district in charge of the Collector of the Port of New York.

On September 1, 1909, it was the owner and managing owner of the yacht Allita, a vessel of unknown gross tonnage. On or about the said last mentioned date said Collector of Customs at the Port of New York levied a tax pursuant to the statute above mentioned at the rate of $7 per gross ton upon the use of said yacht, the amount of said tax being $504.

The Allita was originally the Gadabout of 71.86 tons, built at Montreal, Canada. As the Algonquin she passed into the possession of J. H. Flagler in 1900. It does not appear that at the time of her transfer to Flagler she had been injured or received substantial changes in structure. Having paid $10,000 for the Algonquin, Mr. Flagler lengthened her by inserting approximately 26 feet amidships. He also changed the shape of the stern and rebuilt the bow. The vessel had auxiliary steam, and as lengthened and enlarged the old engine, boilers and wheel were not suitable and were not used. The old boilers and engine were traded for new ones, and including the difference paid for the new propulsive power Mr. Flagler expended upward of $46,000 in changing the Algonquin, which he then renamed the Allita. In 1908 he transferred her (in the process of a real estate transaction) to the defendant Company, which has never used her as a yacht and evidently accepted the vessel only to sell again. The bill of sale from Flagler to defendant was recorded in the Collector's office of the Port of New York July 7, 1909.

The same finding as to the existence and non-taxation of other yachts nor foreign-built and owned or chartered by citizens of the United States as has been hereinabove made in the Billings case is made in this case.

24 *Memorandum.*

The foregoing findings of fact are not intended to be exhaustive; they do not assume to do more than state what appear to me to be the material facts necessary for understanding the opinion of Noyes, J., filed in several of these cases March 8, 1911, as well as the decision about to be made on points not then argued.

If the District Attorney considers a formal finding to the effect that each of these yachts has at some time displayed either the national flag or the yacht ensign it will be made.

Of Customs regulations I think any Federal Court may take notice without finding.

As to all the constitutional points argued, no opinion is expressed other than to say that I follow the decision of Noyes, J., above noted. The same is true of the questions of interpretation passed upon in said opinion, and it is therefore held that the tax is not collectible against those owners domiciled and resident abroad. Also that the tax, being upon the use of a yacht, applies to potential use, and finally that the congressional intent being clear it is not a valid objection to the tax that it is inconsistent (if it is) with our treaty with Great Britain of 1815.

The actions against Blair and the Investors' & Traders Realty Company raise a point not previously discussed, viz: what is meant by a foreign-built yacht.

The Blair case also requires answer to the question, What is the force and effect of the statutory words that the tax "shall be levied and collected * * * by the Collector of Customs of the District nearest the residence of the managing owner?"

The suit against the Investors' & Traders' Company also suggests (though it was not argued) the inquiry as to how the gross tonnage by which the tax is measured is to be ascertained. Before taking up these considerations it is noted that I have found as matter of
25 fact that Mrs. Goelet and Mr. Bennett are both resident and domiciled abroad. It is believed that although many cases, of which De Meli vs. De Meli, 120 N. Y., 485, and People vs. Platt, 117 N. Y., 159 are examples, have held these two words synonymous. that they cannot be so considered in this Court. "Domicile" is a larger word than "residence," because the latter is acquired by the former. Although "domicile" in its ordinary acceptation means the place where a person lives and has his home, yet it implies residence plus animus manendi. The Venus, 8 Cranch, 279; Ennis vs. Smith, 14 How., 423; Mitchell vs. United States, 21 Wall., 352: Newton vs. Commissioners, 100 U. S., 562. These decisions are consistent with the language of Corel vs. Railway Co., 123 Fed. Rep., 452, which points out that "residence" is not synonymous with "domicile," for a man may have more than one place of residence, but he can have but one "domicile." And also with Stout vs. Leonard, 8 Vroom, 492, holding that "domicile is residence combined with intention." And the same distinction is maintained in Long vs. Ryan, 30 Gratton, 718, and Bradley vs. Lowry, Speer's Equity (S. C.) 25.

I.

The Meaning of the Phrase "Foreign-built."

This may be considered from three points of view:

a. What is its signification in the shipping trade and among those familiar with maritime affairs?

b. What light is cast on the inquiry by general usage as evidenced by lexicographers?

c. Are there any decisions of authority?

(*a*) No expert evidence as to the meaning of the phrase was introduced at the trial, but an investigation of congressional publications shows that it was suggested to Congress by those who petitioned for the legislation which finally became the section now under consideration. It appears from House document 1505, 60th Congress, 2d Session (Tariff Hearing, Vol. 7, p. 7526 et seq.) that a
26 considerable number of ship chandlers, and one ship builder, petitioned for the passage of an act laying an ad valorem duty of 75% on any foreign-built yacht thereafter purchased by any citizen of the United States, and several very instructive reasons were advanced in favor of the proposed law, one of them being that the tariff would not be prohibitive because "a certain proportion of the very rich men of America are apparently determined to possess foreign-built yachts at any price without regard to circumstances." And Congress was furnished with a long list of obnoxious vessels alleged to be foreign-built and American owned, which list is thought to include every yacht now under consideration. It may fairly be presumed that in legislating upon the prayer of any portion of the ship-building community congress used language in the sense in which it was proposed, and it is in my judgment common knowledge that any person using the language of the sea means by a "foreign-built" vessel one originally constructed outside the United States, no matter how extensive the changes, alterations or repairs bestowed upon her here may have been.

(*b*) Anything which is built is formed "by uniting materials into a regular structure," and that which is re-built is constructed "after having been demolished."

Changing the name of the Algonquin to Allita, or of the Delaware to Diana, effected nothing. Neither of these vessels was strictly speaking even re-built, for neither had been demolished. The Allita was merely enlarged, while the Diana was both repaired and enlarged.

(*c*) It appears to me that the reasoning of United States vs. The Grace Meade, Fed. Cases 15243, is plainly applicable here.

Rev. Stat. Sec. 4179 prohibits changing the name of any "vessel of the United States," i. e., of any vessel lawfully registered, enrolled or licensed pursuant to legislative authority. The object of that statute is plainly to mark and preserve the identity of any named vessel. As long as the vessel is the same the name must be
27 the same unless changed pursuant to other (and here unimportant) statutes. That decision laid down very clearly the rules by which identity should be determined:

"It may be held as a principle, that, where the keel, stem, and sternposts and ribs of an old vessel, without being broken up and forming an intact frame, are built upon as a skeleton, the case is one of an old vessel rebuilt, and not of a new vessel. Indeed, without regard to the particular parts reused, if any considerable part of the hull and skeleton of an old vessel in its intact condition, without being broken up, is built upon, the law holds that in such a case it is the old vessel rebuilt, and not a new vessel."

The Diana and the Allita in their present condition are either

foreign-built or home-built. If they are home-built they must have been constructed when Messrs. Flagler and Chubb respectively expended such extraordinary sums on them. The same vessel can only be built once—she may be rebuilt many times, but that does not destroy identity under the decision quoted. If they were not new vessels, and new vessels in the technical sense of that word, when they were respectively put into commission after lengthening the Algonquin and after the fire on the Delaware, then they are the same vessels as they were before, however greatly changed in outward appearance, in value or material. If these two yachts had been originally home-built, and that had been done to them which was done, could their respective owners have given new names to them without due application to the Commissioner of Navigation? Plainly not under the language of the decision above quoted. And if the identity of the vessels was not sufficiently destroyed to authorize re-christening, if vessels of the United States, they must remain foreign-built. Even American re-building cannot change that.

It is therefore held that both the Allita and the Diana
28 are foreign-built yachts as that phrase is used in the statute under consideration.

II.

The Force of the Phrase Designating the Officers by Whom the Tax "Shall Be Levied and Collected."

However shadowy in practice the difference is between a tax upon the potential use of a yacht and the yacht itself—especially when such tax may be perpetually commuted by the payment of an ad valorem duty—it is admittedly essential to the Government's position that the taxation be directed against the privilege of use, and therefore accessible to and collectible from the personal user.

It is then highly appropriate that, like almost every other personal tax, the place of taxation shall be the residence of the person taxed, and such is the plain direction of the statute. It is therefore obvious to me that when the act declares that a particular Collector shall levy and collect the tax, it means that he must do something by way of apprising the person who is called upon to pay, of the claim made.

It seems elementary that if one particular officer is charged with the duty, no other officer can lawfully perform that duty.

The word "levy" in law has had many meanings attributed to it (see a collection of them; Words and Phrases, Tit. "Levy"), but nothing suitable to any meaning given was done by the Collector nearest the residence of Mr. Blair. Whatever was done was the act of the corresponding functionary in New York. It is not for the defendant to declare what is necessary; it is enough that the designated official did nothing, so that the Government to prevail in this action must assert (as is done arguendo) that if *in* any notice of the tax is given to the yacht owner and he does not pay, an action such as this can be maintained. For this claim no basis is perceived.

29

III.

The Measurement of Tonnage.

The complaint against the Investors' & Traders' Company alleges that the Collector of Customs "duly levied upon the use of the said yacht * * * a sum equivalent to a tonnage tax of $7 per ton, to wit $504." This is evidently $7 a ton on the original tonnage of the vessel. It is common knowledge that the result of what was done to the Allita was to increase her tonnage; yet in her last recorded bill of sale she is still described as being of the same tonnage that she was when she was 26 ft. shorter.

The fact appears to be that the tonnage has been taken from her documenting, and the documents not being required by any statute of the United States have been continued without any re-measurement.

This tax is therefore incorrect, but as it is plainly less than the Government would be entitled to demand, the defendant is not in a position to object.

The contentions of several counsel that the tax should be apportioned either in respect of time or in respect of material have not been overlooked, but of them it is enough to say that any such interpretation of the statute amounts in my judgment to a judicial amendment thereof. It may be a very just and *and* desirable amendment, but is, if not wholly beyond the power of any Court, entirely beyond the proper scope of action of a trial court.

Decision.

In United States vs. Billings judgment is directed for the plaintiff;
In United States vs. Pierce judgment is directed for the plaintiff.

30 In United States vs. Rainey judgment is directed for the plaintiff;

In United States vs. Bennett judgment is directed for defendant;
In United States vs. Goelet judgment is directed for defendant;
In United States vs. Blair judgment is directed for defendant;
In United States vs. Investors' & Traders' Realty Company, judgment is directed for plaintiff.

5/1/11.

(Endorsed:) U. S. Circuit Court, Southern District, N. Y. Filed May 1, 1911. John A. Shields, Clerk.

31 *Findings of Fact and Conclusions of Law.*

Action No. 2.

United States Circuit Court, Southern District of New York.

UNITED STATES OF AMERICA, Plaintiff,
vs.
CORNELIUS K. G. BILLINGS, Defendant.

Decision.

The issues of fact raised by the answer of the defendant herein coming on to be tried by this Court at a regular term thereof held by the undersigned without a jury, a jury having been waived by both parties, and having been tried on the 10th and 11th days of April, 1911, and the allegations and evidence of the parties having been heard; now, after hearing Addison S. Pratt, Esq., Assistant United States Attorney for the Southern District of New York, of counsel for the plaintiff, and Francis S. Bangs, Esq., of counsel for the defendant, and due deliberation having been had thereon, I decide and find as follows:—

Findings of Fact.

1. Defendant is a citizen and resident of the United States and has his domicile in the United States. On the 1st day of September, 1910, he was the owner and managing owner of the steam yacht "Vanadis."

2. The said steam yacht "Vanadis" was built in the Kingdom of Great Britain in the year 1908 and its gross tonnage on the said 1st day of September, 1910 was 1091.79 tons. It had not been, and was not on the said 1st day of September, 1910, used

32 or intended to be used for trade.

3. The defendant acquired title to the said steam yacht "Vanadis" on the 29th day of May, 1908, by a bill of sale from John Inglis, of Pointhouse Shipyard, Glasgow, Scotland, dated on the said day. She was in an unfinished condition at that time, but her master immediately brought her to the United States, and the defendant expended in the United States in completing her and finishing what had not been done under the contract for her construction about $70,000. The defendant has also expended upon her since she was completed, in work not in the nature of upkeep, about $75,000.

4. On the 8th day of June, 1908 the defendant caused the said bill of sale to be recorded in the office of the Collector of Customs of the Port of New York, in Book 1 of Foreign Built Vessels, page 174, and on the 9th day of June, 1908, the said Collector endorsed on the said bill of sale a certificate in the following form, and thereafter returned the bill of sale to the defendant:—

Form of Certificate Endorsed on Bill of Sale of Foreign-Built Vessel Purchased by a Citizen.

Custom House, Port of New York.

I, J. W. Johnson, Deputy Collector of Customs for the Port of New York, in the State of New York, in the United States of America, do hereby certify that the within Bill of Sale bearing date of May 29th 1908 of the steam yacht Vanadis of 515.82 tons registered tonnage, sold and transferred by John Inglis, of Pointhouse Shipyard, Glasgow, to Cornelius K. G. Billings, of New York City, is, in form and substance, valid and effective in law, and has been duly recorded in this office; and that the said Cornelius K. G. Billings is a citizen of the United States.

33 As witness my hand and the seal of this office, this 9th day of June, in the year of our Lord one thousand nine hundred and eight.

J. W. JOHNSON,
[SEAL.] *Deputy Collector.*

5. On the 2nd day of January, 1908, Hon. George B. Cortelyou, Secretary of the Treasury of the United States, established the following regulation for the information and guidance of officers of the customs, which regulation has ever since been in full force and effect.

ART. 62. Certificate of Protection. Any foreign-built vessel purchased by a citizen, although prohibited from being documented, is nevertheless entitled to legal protection as property of a citizen. The collector may issue to any such vessel, owned by a citizen, a certificate in proper form, of the validity and filing of the bill of sale. A separate record will be kept of these vessels, and in the tonnage returns they will be reported in a separate column, under the head of "Foreign-built or undocumented vessels owned by citizens of the United States."

6. On the 26th day of April, 1909, Hon. George Nagel, Secretary of Commerce and Labor of the United States, issued to the defendant upon his request a Commission for a Pleasure Yacht, in words and figures following, to wit:—

Commission for a Pleasure Yacht.

50159 N.

The Secretary of Commerce and Labor of the United States of America to all to whom these presents shall come, Greeting:

Be it known, That whereas the Yacht called the Vanadis of New York, whereof Thomas Farrington is at present master or commander, being — rigged, propelled by steam, and of the burden of 516 net tons or thereabouts, her official number being —, belonging

to an Association duly incorporated and organized under the laws of the State of New York, known as the New York Yacht Club, hath been duly recorded according to law, which said yacht is now lying at the Port of New York, bound for foreign ports, on a voyage of pleasure. And whereas Cornelius K. G. Billings, the owner thereof, hath made application for a Commission for the said yacht under the provisions of the Title hereinafter mentioned.

Now, therefore, I, Charles Nagel, Secretary of Commerce and Labor, in pursuance of authority in me vested by Chapter Two, Title XLVIII "Regulation of Commerce and Navigation," of the Revised Statutes of the United States, and the Act of Con-
34 gress approved February 14, 1903, do hereby Commission the aforesaid yacht as a vessel entitled to proceed by sea to foreign ports, Provided, That said yacht shall not transport merchandise, nor carry passengers for pay, nor engage in any unlawful trade, nor in any way violate the laws of the United States. And provided further, That the said yacht having visited a foreign country, shall, on returning to the United States, make due entry at the Custom House of the District within which on such return she shall first arrive, and shall thereupon surrender this Commission; and so long as the aforesaid conditions shall be faithfully observed this Commission shall be a Token of Credit to any United States official at home or abroad, and to the authorities of any power, for the privileges enjoyed under it.

In Witness whereof, I have hereunto subscribed my name and caused the Seal of the Department of Commerce and Labor to be affixed at the City of Washington, on the 26th day of April in the year of our Lord one thousand nine hundred and nine.

[SEAL.] CHARLES NAGEL,
Secretary of Commerce and Labor.

Attest:
EUGENE TYLER CHAMBERLAIN,
Commissioner of Navigation.

7. On the 26th day of August, 1909, the defendant surrendered the said Commission.

8. During the year from the 1st day of September, 1909, to the 1st day of September, 1910, the said yacht was in commission, except for the period from the 12th day of October, 1909, to the 24th day of January, 1910, when she was laid up and out of commission at Staten Island, in the State of New York. During the said year, with the exception of the said period, she was used by the defendant on various cruises from port to port in the
35 United States and on one cruise from Aransas Pass, Texas, to Tampico, Mexico, from the 8th to the 27th days of March, 1910. At various times on these cruises she was on the high seas.

9. On or about the 1st day of September, 1910, the Collector of Customs at the Port of New York levied a tax under Section 37 of the Tariff Act of August 5th, 1909, of $7.00 per gross ton upon the use of the said yacht, and gave notice to the defendant and demanded payment thereof. The amount of the said tax was the sum

of $7644.00 and has not been paid, nor has defendant paid a duty of 35 per cent ad valorem upon the said yacht in lieu of the said tax. The district of the said Collector was the district nearest the residence of the defendant.

10. The said yacht has never been registered, enrolled or documented as a vessel of the United States.

11. At the time of the passage of the said Tariff Act of August 5th, 1909, and on the said 1st day of September, 1910, there were, and ever since have been, in the United States, and within its jurisdiction, a large number of yachts, pleasure-boats and vessels, not used or intended to be used for trade, and not foreign-built, which were then owned or chartered for more than six months by citizens of the United States, and which were and are similar to the defendant's said yacht in all substantial respects as to construction, character and nature of property, and identical with the said yacht in all respects as to use and as being personal property of citizens of the United States; but upon the use of which property so similarly situated no tax is imposed by the said Act of Congress and that no such tax has in fact been imposed upon such yachts not foreign built.

36 *Conclusions of Law.*

1. Section 37 of the Tariff Act of August 5th, 1909, is valid and not in conflict with the Constitution of the United States, or any portion thereof, and the tax imposed thereby is not unreasonably arbitrary or discriminatory. It does not deprive the defendant of his property without due process of law.

2. The said steam yacht "Vanadis" is a foreign-built yacht within the meaning of said Section 37 of the Tariff Act of August 5th, 1909.

3. The said steam yacht "Vanadis" is not entitled to be registered, enrolled or documented as a vessel of the United States.

4. The said tax of $7,644 was duly and lawfully levied under the said Act by the collector of Customs of the Port of New York on the 1st day of September, 1910, against the defendant on the use of the said yacht.

5. The plaintiff is entitled to judgment against the defendant for the sum of $7,644, with its costs and disbursements, but without interest, and I direct judgment accordingly.

Dated, New York, July 5, 1911.

C. M. HOUGH, *D. J.*

(Endorsed:) U. S. Circuit Court, Southern District N. Y., Filed Jul- 5, 1911, John A. Shields, Clerk.

37 *Exceptions.*

Circuit Court of the United States, Southern District of New York.

Action No. 2.

UNITED STATES OF AMERICA, Plaintiff,
against
CORNELIUS K. G. BILLINGS, Defendant.

Exceptions.

The defendant excepts to the conclusions of law made by the court numbered I, IV, and V.

Dated New York, July 13, 1911.

GUTHRIE, BANGS & VAN SINDEREN,
Attorneys for Defendant.

Office and Post-office Address, 44 Wall Street, Borough of Manhattan, New York City.

(Endorsed:) U. S. Circuit Court, Southern District N. Y., Filed Jul- 13, 1911, John A. Shields, Clerk.

38 *Judgment.*

United States Circuit Court, Southern District of New York.

Action No. 2.

UNITED STATES OF AMERICA, Plaintiff,
vs.
CORNELIUS K. G. BILLINGS, Defendant.

The issues in this action having duly come on for trial before Hon. Charles M. Hough, District Judge, at a Stated Term of this Court held at the United States Court House and Post Office Building, in the Borough of Manhattan, City, County and State of New York, on the 10th and 11th days of April, 1911, without a jury, a jury having been waived by consent of both parties in open Court, and the Court, after due deliberation, having directed judgment in favor of the plaintiff and against the defendant for the sum of Seven thousand six hundred and forty-four dollars ($7,644.00), with costs and disbursements, but without interest, and having thereafter, on the 5th day of July, 1911 duly made and filed its decision in favor of the plaintiff and against the defendant, containing a statement of the facts found and the conclusions of law thereon, and directing judgment in favor of the plaintiff and against the defendant for the sum of Seven thousand six hundred and forty-

four dollars ($7,644.00) with costs and disbursements, but without interest,

Now, on motion of Henry A. Wise, United States Attorney for the Southern District of New York, Attorney for the plain-
39 tiff, it is

Ordered and adjudged, that the plaintiff have judgment against the defendant for the sum of Seven thousand six hundred and forty-four dollars ($7,655.00) without interest, but with its costs and disbursements, to be taxed by the Clerk of this Court and amounting as taxed to the sum of $21.52/100 and making the total sum of $7,665.52/100 and that execution issue therefor.

Dated, July 13th, 1911.

Judgment signed this 13th day of July, 1911.

JOHN A. SHIELDS, *Clerk.*

(Endorsed:) U. S. Circuit Court, Southern District N. Y., Filed Jul- 13, 1911, John A. Shields, Clerk.

40 Circuit Court of the United States, Southern District of New York.

Action #2.

UNITED STATES OF AMERICA, Plaintiff,
against
CORNELIUS K. G. BILLINGS, Defendant.

Bill of Exceptions.

On the trial of this cause in this Court on the 10th and 11th days of April, 1911, the Hon. Charles M. Hough, District Judge, then presiding, the plaintiff appearing by Addison S. Pratt, Assistant United States Attorney, of counsel, and the defendant by Francis S. Bangs, of counsel, the following proceedings were had, to wit:

Trial by a jury was waived by the defendant, in open Court, and thereupon the plaintiff, to sustain the issue upon its part, offered the following testimony and evidence:

Mr. PRATT: There are no unusual defenses in this action, except the defense that it is not entitled to documentation, etc., and that the tax is an illegal discrimination.

It is stipulated that on January 2nd, 1908, Hon. George B. Cortelyou, Secretary of the Treasury, established certain customs regu-
41 lations, which are found in this printed volume entitled "Customs Regulations, 1908, Treasury Department," among which is Article 62, which is in the exact language stated in the Complaint.

This Regulation is printed in full in Paragraph 5 of the Decision.

Mr. PRATT: I offer in evidence a certified copy of the bill of sale of the yacht Vanadis, from John Inglis, to Cornelius K. G. Billings,

dated May 29th, 1908, endorsed on which is an endorsement to the effect that the certificate in accordance with Article 62 of the Customs Regulations, 1908, is endorsed on the within bill of sale.

Received in evidence and marked Government's Exhibit 1, and the following is a copy thereof:

The certificate is printed in full in Paragraph 4 of the decision.

"Certificate in form and substance as above, endorsed on the original of within Bill-of-Sale on June 9th, 1908."

Duplicate.

Bill of Sale. (Individuals or Joint Owners). Official Number 128189. Name of Ship Vanadis No. 48 Date 1908 Port of Registry Glasgow Whether a Sailing or Steamship Steam Yacht—Horse Power of Engines, if any 2700 I. H. P. Number of Tons Gross 1091.79 Registered 515.82.

	Feet.	Tenths.
Length from fore part of stem, under the bowsprit to the aft side of the head of the stern post.....	249	45
Main breadth to outside of plank.....	32	7
Depth from top of deck at side amidships to bottom of keel	20	17

42 I, John Inglis, of Pointhouse Shipyard, Glasgow, Shipbuilder in consideration of the Sum of One Pound Sterling and other valuable considerations paid to me by Cornelius K. G. Billings, Esq., of New York City, in the United States of America the Receipt whereof is hereby acknowledged, transfer sixty four Sixty Fourths Shares in the Ship above particularly described, and in her boats, guns, ammunition, small arms, and appurtenances, to the said Cornelius K. G. Billings.

Further I the said John Inglis for myself and my heirs covenant with the said Cornelius K. G. Billings and his assigns, that I have power to transfer in manner aforesaid the premises herein-before expressed to be transferred and that the same are free from encumbrances.

In witness whereof I have hereunto subscribed my name and affixed my seal this twenty-ninth day of May, one thousand nine hundred and eight.

(Signed) JOHN INGLIS. [SEAL.]

Executed by the above-named John Inglis in the presence of—

(Signed) J. STEWART,
Yacht Broker, 53 Bothwell Street, Glasgow.

(Signed) CLINTON H. CRANE,
52 *Pine St., New York, Naval Architect.*

Certificate to be Issued to Citizens of the United States Being Purchasers of American Foreign-built Vessels in a Foreign Port.

I, John N. McCunn, American Counsul, for the Port of Glasgow, Scotland, do hereby certify that the within bill of sale, bearing date the Twenty-ninth day of May, 1908, of the Steam
43 Yacht "Vanadis" sold and transferred by John Inglis to Cornelius K. G. Billings, of New York City, has been proved satisfactorily to me to have been duly executed by the subscribing party, and I further certify that Cornelius K. G. Billings therein mentioned as purchaser of said vessel is a citizen of the United States.

Witness my hand and seal of office at Glasgow, Scotland, this Twenty-ninth day of May, 1908.

(Signed) J. N. McCUNN,
[CONSULAR SEAL.] *American Consul.*

(Consular Fee Stamp, $2.)

Received for record 8 June, 1908, at 10 h. 40 m. A. M.
JNO. A. SCARLETT,
R. Clerk.

Certificate in Accordance with Article 62, Custom Regulations of 1899, Endorsed on the Within Bill of Sale.

Port of New York,

Collector's Office.

JUNE 9, 1908. J. A. S.

I hereby certify, the within to be a true copy of the record of the bill of sale received for record in this office, June 8th in the year 1908, and recorded in book F. B. V. 1, page 174.

Given under my hand, and the seal of the Collector this 6th day of March in the year 1911.

[Seal of Collector of Customs.]

J. W. JOHNSON,
Deputy Collector.
J. S. W.

Compared by B. B. J. S. W.

44 It is admitted that the form of this certificate so endorsed is the form annexed to the complaint.

Mr. PRATT: I also offer in evidence the commission for a pleasure yacht, dated April 26, 1909, issued by the Secretary of Commerce and Labor to Cornelius K. G. Billings, the owner of the yacht Vanadis.

Received in evidence as Government's Exhibit 2, and the following is a copy thereof:

Application for a Yacht Commission.

50159 N.

NEW YORK *April 24th*, 1909.

Commissioner of Navigation, Department of Commerce and Labor, Washington, D. C.

SIR: Application is hereby made, under the provisions of Section 4217, U. S. Revised Statutes, for a commission for American owned foreign built steam yacht Vanadis of New York official number 516 net *net* tons, Thomas Farrington, master, and Cornelius K. G. Billings, owner.

Said vessel belongs to the New York Yacht Club, incorporated under the laws of the State of New York, and now lies at the port of New York, bound on a pleasure voyage to foreign ports.

Respectfully

CORNELIUS K. G. BILLINGS,
Owner,

Per CAMPBELL & GARDINER,
Agents.

COLLECTOR'S OFFICE, PORT OF NEW YORK,
April 24, 1909.

B. B.
45 The above application is hereby approved.

D. A. BAKER,
Special Deputy Collector.
J. W. J.

Bill of Sale recorded, Custom House, New York, June 8, 1908.
(Stamped:) Bureau of Navigation—Received Apr. 26 1909—Dept' of Commerce and Labor.

50159 N.

DEPARTMENT OF COMMERCE AND LABOR,
BUREAU OF NAVIGATION,
WASHINGTON, *April* 26, 1909.

T. B. S.

Collector of Customs, New York, N. Y.

SIR: Referring to your report of the 24th instant, I transmit under another cover, a commission for the yacht "Vanadis." It may be delivered to her master or owner.

Respectfully,

E. T. CHAMBERLAIN
Commissioner.

The Commission is printed in full in Paragraph 6 of the Decision.

Government rests.

Mr. BANGS: I move to dismiss the complaint on the ground that it does not state facts sufficient to constitute a cause of action, and

On the ground that no facts have been proven constituting a cause of action.

Motion denied. Exception by defendant.

Mr. BANGS: It is stipulated that the defendant's vessel is foreign-built and not entitled to be registered, enrolled or documented
46 and is not in fact registered, enrolled or documented.

THOMAS FARRINGTON, a witness called on behalf of the defendant, being duly sworn, testified as follows:

Direct examination by Mr. BANGS:

I am master of the yacht Vanadis and have been since she was built, 1908. I brought her to the United States in an unfinished condition. I have been on — all the time since she has been built.

Q. Where has she been during that time, September 1, 1909, during the year 1910, down to the 1st of September, 1907?

Mr. PRATT: I object to that as irrelevant, immaterial.

Objection overruled. Exception by the Government.

A. She has been cruising. I have her log. I can produce it. It is over there.

(Witness produces log).

Mr. BANGS: The witness produces the log, and he has in his hand a memorandum which he says he has made up.

That is a correct abstract from this log as made up by me, sir.

Q. Now, will you state where the Vanadis has been during that time?

Mr. BANGS: I was about to suggest that it go in.

Mr. PRATT: I shall object to its going in, that it is immaterial. Otherwise I don't object to it.

The COURT: I overrule that objection.

Exception by the Government.

Said abstract of log is received in evidence and marked
47 Defendant's Exhibit 3 and the following is a copy thereof:

"Movement of the Yacht Vanadis from Sept. 1, 1909, to Sept. 1, 1910.

Sept.	1.	Anchored at Newport.
"	2.	Left Newport for City Island.
"	3-4.	At Anchor at City Island.
"	5.	Cruising in American waters.
"	6-11.	At anchor at City Island.
"	12-13.	At anchor off Dyckman Street.
"	14.	Cruising up the Hudson.
"	15-18.	At anchor off Dyckman Street.
"	19.	Cruising up the Hudson.
"	20-24.	At anchor off Dyckman Street.
"	25-26.	Took part in the Hudson-Fulton Celebration.
"	27 to	

Oct.	8.	At anchor off Dyckman Street.
"	9.	Cruising up the Hudson.
"	10-12.	Anchored off Dyckman Street.
"	10 to	
Jan.	24.	Out of commission at dock, Port Richmond, S. I.
"	24.	Cleared for Brunswick, Ga.
"	25-26.	At sea.
"	27.	Arrived at Brunswick, Ga.
"	28 to	
Feb.	22.	At anchor at Brunswick, Ga.
"	23.	Left for Savannah.
"	24-25.	At anchor at Savannah.
"	26.	Cleared for New Orleans.
"	27,	
"	28 &	
March	1.	At sea.
"	2.	Arrived at New Orleans.
"	3-5.	At anchor at New Orleans.
"	6.	Cleared for Aranson Pass.
"	7.	At sea.
"	8.	Arrived at Aranson Pass.
"	9.	Cleared for Tampico.
"	10.	Arrived at "
"	11-23.	At anchor at "
"	24.	Cleared for New Orleans.
"	25-26.	At sea.
"	27.	Arrived in New Orleans.
"	28.	At anchor at New Orleans
"	29.	Cleared for New York.
"	30 to	
April	3.	At sea.
"	4.	Arrived at New York.
"	5.	In dry dock.
"	6	
" to	26.	At dock, Port Richmond, S. I.
"	27.	Anchored at Hoboken.
48		
May	27.	Anchored at Hoboken.
"	27 to	
June	4.	At anchor off Dyckman Street.
"	5.	Cruising up the Hudson.
"	6.	At anchor off Dyckman Street.
"	7-17.	At anchor off Dyckman Street.
"	18-19.	Cruising to New London.
"	20-21.	At anchor off City Island.
"	22.	Cruising on the Sound.
"	23-24.	At anchor off Dyckman Street.
"	25.	Cruising up the Hudson.
"	26.	At anchor off Dyckman Street.
"	27.	At anchor off City Island.
"	28-29-30.	Cruising on the Sound.

July	1.	At anchor off City Island.
"	2.	Cleared for Newport.
"	3.	Arrived at Newport.
"	4.	Arrived at City Island.
"	5-6.	At anchor off City Island.
"	7.	Cruising in New Haven.
"	8.	In dry dock at Hoboken.
"	9-10.	Anchored in North River.
"	11.	Anchored at City Island.
"	12.	Cleared for Province Town.
"	13.	Arrived at Province Town.
"	14.	At sea.
"	15.	Arrived at Larchmont.
"	16.	Left City Island for Newport.
"	17.	Left Newport for City Island.
"	18.	At anchor off City Island.
"	19.	Cruise to Larchmont.
"	20-22.	At anchor off City Island.
"	23.	Cruise to New London.
"	24-26.	At anchor off City Island.
"	27.	Cruise on the Sound.
"	28-31.	At anchor off City Island.
Aug.	1.	Sailed for Marblehead.
"	2.	Arrived at Marblehead.
"	3.	Left for New London.
"	4.	At sea.
"	5.	Arrived in New London.
"	6.	Sailed for Newport.
"	7.	Arrived at City Island.
"	8-17.	At anchor off City Island.
"	18.	Sailed to Sag Harbor.
"	19.	At anchor off City Island.
"	20.	Sailed to New London.
"	21.	Sailed to Newport.
"	22.	Sailed to City Island.
"	23-26.	At anchor off City Island.
"	27.	Cruise to New London.
"	28.	At anchor off City Island.
"	29.	Sailed to Sag Harbor.
"	30.	Sailed to Newport.
"	31.	Sailed to Sag Harbor.

49 FRED SCHLOSSER, a witness called on behalf of the defendant, being duly sworn, testified as follows:

Direct examination by Mr. BANGS:

I am in charge of the books of Tams, Le Moyne & Crane. Their business is that of Naval architects. I am familiar with the yacht Vanadis. The expenditures upon that vessel have been made through the office of Tams, Le Moyne & Crane. The original expenditures for the construction of the boat. She was in an un-

finished condition when she arrived in the United States. Considerable work was done to her in the completion, general work.

Mr. PRATT: I object to this line of testimony.

Objection overruled. Exception by the Government.

I did not see her, but from the bills, I know that there was considerable general work done upon her after she arrived in this country finishing what could not have been done under the contract. I should think the amount of those expenditures was around seventy odd thousand dollars.

Q. Do you know of work that has been done upon her since—not in the nature of upkeep

A. I do, yes, sir.

Mr. PRATT: I object to all that, too.

Same ruling and exception.

I don't believe I could say off-hand what that expediture has been. I could probably make a good guess though. I know that they were about another seventy or seventy-five thousand dollars.

Mr. BANGS: It is stipulated that at the time of the passing
50 and approval of the Act of Congress entitled "An Act to provide revenue, equalize duties and encourage the industries of the United States, and for other purposes," approved August 5, 1909, and of the alleged levy of said annual tax upon the use of this defendant's said yacht, pursuant to section 37 of said Act, there were and ever since have been in the United States, and within its jurisdiction, a large number of yachts, pleasure-boats and vessels not used or intended to be used for trade, and not foreign-built, which were then owned or chartered for more than six months by citizens of the United States, and which were and are similar to this defendant's said yacht in all substantial respects as to construction, character and nature of property and identical with this defendant's said yacht in all respects as to use and as being personal property of citizens of the United States, but upon the use of which property so similarly situated no tax is imposed by the said act of Congress, and that in fact no tax has been imposed or levied upon such domestic built vessels.

And also that the yacht Vanadis has not at any time been and is not now registered or documented as a vessel of the United States.

The defendant rests.

Testimony closed.

Mr. PRATT: I ask for judgment.

Mr. BANGS: I renew the motion to dismiss on the grounds stated at the close of the Government's case, and upon the following
additional grounds: (1) that the defendant's yacht has been
51 used by the defendant outside of the waters or territorial limits or jurisdiction of the United States from time to time, and at various times during the year preceding the 1st day of September, 1910, and was not used for six months during such year within the waters or territorial limits or jurisdiction of the United

States; (2) that at the time of the passing and approval of the Act of August 5, 1909, and of the alleged levy of the tax on the use of the defendant's yacht, pursuant to section 37 of said act, there were and ever since have been in the United States and within its jurisdiction a large number of yachts, pleasure boats and vessels not used or intended to be used for trade and not foreign-built, which were then owned or chartered for more than six months by citizens of the United States, and which were and are similar to this defendant's said yacht in all substantial respects as to construction, character and nature of property, and identical with the defendant's yacht in all respects as to use and as being personal property of citizens of the United States, but upon the use of such property so similarly situated no tax is imposed by the said Act of Congress. That said Act of Congree-, in so far as it purports in and by section 37 thereof to direct the levy and collection of a tax upon the use of the defendant's yacht, is not a general law operating upon all citizens of the United States owning and using like property under substantially similar conditions and circumstances, and that the levy and collection from the defendant of a sum equivalent to a tonnage tax of $7 per gross ton does not constitute the levy and collection of any tax, duty, impost
52 or exer- within the true meaning of the Constitution of the United States, and would deprive the defendant of his property without due process of law, in contravention of the fifth article of amendment of the Constitution of the United States.

The COURT: Note on the record that the defendant moves to dismiss, and that the plaintiff moves for judgment, both of which motions are taken under advisement.

And thereafter the Court rendered its decision in writing, directing judgment in favor of the plaintiff and against the defendant for the amount demanded in the complaint, to which action of the Court the defendant thereafter duly excepted.

And now in furtherance of justice and that right may be done the defendant Cornelius K. G. Billings, tenders and presents the foregoing as his Bill of Exceptions in this case to the action of the Court, and prays that the same may be settled and allowed and signed and sealed by the Court and made a part of the record.

The foregoing Bill of Exceptions, is hereby settled and allowed and signed and sealed, and is ordered on file and made a part of the record, this 15th day of July, 1911.

C. M. HOUGH, *D. J.*

Approved and agreed upon

HENRY A. WISE,
Attorney for Plaintiff.
GUTHRIE, BANGS & VAN SINDEREN,
Attorneys for Defendant.

53 (Endorsed:) U. S. Circuit Court, Southern District, N. Y. Filed July 17, 1911. John A. Shields, Clerk.

54 Circuit Court of the United States, Southern District of New York.

Action No. 2.

UNITED STATES OF AMERICA, Plaintiff,
against
CORNELIUS K. G. BILLINGS, Defendant.

Assignment of Errors.

The defendant in this action in connection with his petition for a writ of error, assigns for error the following:

First. The court erred in entering judgment in favor of the plaintiff and against the defendant for the amount demanded in the complaint.

Second. The court erred in ruling that the defendant's yacht was subject to the tax laid under section 37 of the Act of August 5, 1909 (c. 6, 39 Stat. 11).

Third. The court erred in holding that the said act did not conflict with the requirement of due process of law contained in the Fifth Amendment to the Constitution of the United States.

Wherefore, the defendant prays that the judgment of the said Circuit Court be reversed.

GUTHRIE, BANGS & VAN SINDEREN,
Attorneys for Defendant.

Office and Post Office Address: 44 Wall Street, Borough of Manhattan, City of New York.

(Endorsed:) U. S. Circuit Court, Southern District, N. Y. Filed Jul- 13, 1911. John A. Shields, Clerk.

55 United States Circuit Court, Southern District of New York.

Action #2.

UNITED STATES OF AMERICA, Complainant,
against
CORNELIUS K. G. BILLINGS, Defendant.

Bond.

Know all men by these presents: That the Fidelity and Deposit Company of Maryland, a surety corporation duly authorized to transact business under the Act of Congress approved August 13th, 1894, having an office at No. Two Rector Street in the Borough of Manhattan, City of New York, is held and firmly bound unto the United States of America in the full and just sum of Eight thousand Dollars, ($8,000.00) lawful money of the United States to be paid

to the said United States of America for which payment well and truly to be made the said Fidelity and Deposit Company of Maryland binds itself, its successors and assigns firmly by these presents. Sealed with its corporate seal. Dated this thirteenth day of July, one thousand nine hundred and eleven.

Whereas lately at a Circuit Court of the United States for the Southern District of New York in a suit depending in said Court between the Complainant and Defendant herein above named, a final judgment was rendered against the said Cornelius K. G. Billings, and the said Cornelius K. G. Billings having obtained a Writ of Error and filed a copy thereof in the Clerk's Office of the said Court to reverse the judgment in the aforesaid suit and a citation directed to the said United States of America citing and admonishing it to be and appear at a session of the Supreme
56 Court of the United States to be holden at the City of Washington.

Now the condition of the above obligation is such that if the said Cornelius K. G. Billings shall prosecute his said appeal to effect and answer all damages and costs if he fail to make his said plea good then the above obligation to be void otherwise to remain in full force and effect.

FIDELITY AND DEPOSIT COMPANY
OF MARYLAND,
CHARLES V. R. MARSH,
Attorney-in-Fact.

Attest:
JAMES R. KINGSLEY, *Attorney.*

(Statement of Surety Company attached.)

Approved as to form and also as to sufficiency of sureties, with reservation, however, to the defendant in error of the right at any time to examine the proper officers of the Surety Company under oath, touching its assets, liabilities and financial condition generally.

WALTER C. NOYES,
U. S. Circuit Judge.

(Endorsed:) U. S. Circuit Court, Southern District, N. Y. Filed Jul- 13, 1911. John A. Shields, Clerk.

57 *Citation.*

THE UNITED STATES OF AMERICA, *ss:*

To the United States of America, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, to be holden at the City of Washington, on the 12th day of August, 1911, next, pursuant to a writ of error filed in the Clerk's office of the Circuit Court of the United States for the Southern District of New York, wherein Cornelius K. G. Billings is the plaintiff in error and you are defend-

ant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and speedy justice be done to the parties in that behalf.

Given under my hand at the Borough of Manhattan, in the City of New York, in the District and Circuit above named, this 13th day of July in the year of our Lord one thousand nine hundred and eleven, and of the Independence of the United States the one hundred and thirty-sixth.

WALTER C. NOYES,
Judge of the Circuit Court of the United States
for the Southern District of New York.

58 [Endorsed:] Law. 6/124. E. & A. D. 3267. Supreme Court of the U. S. Cornelius K. G. Billings, Plaintiff-in-Error, against United States of America, Defendant-in-Error. Action No. 2. Citation. William D. Guthrie, Attorney for Plaintiff-in-Error, 44 Wall Street, New York City. A copy of the within paper has been this day received at this office. Jul- 13, 1911. Henry A. Wise, U. S. Attorney. U. S. Circuit Court, Southern District, N. Y. Filed Jul- 13, 1911. John A. Shields, Clerk.

[Endorsed:] United States Supreme Court. Cornelius K. G. Billings, Plff. in Error, vs. United States of America, Deft. in Error. Action # 2. Transcript of record.

Endorsed on cover: File No. 22,816. S. New York, C. C. U. S. Term No. 67. Cornelius K. G. Billings, plaintiff-in-error, vs. The United States. Filed July 25th 1911. File No. 22,816.

(22,823)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1913.

No. 73.

ROY A. RAINEY, PLAINTIFF IN ERROR,

vs.

THE UNITED STATES.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

INDEX.

	Original.	Print
Writ of error	1	1
Clerk's certificate	2	2
Summons	3	2
Complaint	4	3
Amended answer	9	6
Stipulation waiving jury	19	10
Opinion, Hough, D. J.	20	11
Findings of fact and conclusions of law	38	19
Exceptions of defendant to findings of fact, etc.	44	23
Judgment	46	25
Bill of exceptions	48	26
Statement and offers of the Government	48	26
Government Exhibit 1—Bill of sale	50	27
Motion to dismiss	52	28
Exhibit 2—Stipulation as to facts	54	29
Exhibit 3—Stipulation as to facts	57	32
Stipulation as to bill of exceptions	62	34
Judge's certificate to bill of exceptions	62	34
Assignments of error	63	35
Bond	67	37
Citation	69	39

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JULY 8, 1913.

1 *Writ of Error.*

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Judges of the Circuit Court of the United States for the Southern District of New York, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Circuit Court, before you, or some of you, between The United States of America, plaintiff below and defendant in error and Roy A. Rainey, defendant below and plaintiff in error a manifest error hath happened, to the great damage of the said plaintiff in error as is said and appears by his complaint: We, being willing that such error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Justices of the Supreme Court of the United States, at the Capitol in the City of Washington, together with this writ, so that you have the same at the said place, before the Justices aforesaid, on the twelfth day of August next, that the record and proceedings aforesaid being inspected, the said Justices of the Supreme Court may cause further to be done therein, to correct that error, what of right and according to the law and custom of the United States ought to be done.

Witness, the Honorable Edward D. White, Chief Justice of the Supreme Court of the United States, this 13th day of [L. S.] July in the year of our Lord one thousand *eight* hundred and eleven and of the Independence of the United States the one hundred and thirty-sixth.

[Seal of the Circuit Court, South. Dist. New York.]

JOHN A. SHIELDS,
Clerk of the Circuit Court of the United States of America for the Southern District of New York, in the Second Circuit.

The foregoing writ is hereby allowed.
WALTER C. NOYES,
U. S. Circuit Judge.

2 [Endorsed:] Law, 6/113. E. & A. D. 3268. Supreme Court of the United States. Roy A. Rainey, Plaintiff in Error, vs. The United States of America, Defendant in Error. Writ of Error. Action # 2. C. Andrade, Jr., Attorney for Plaintiff in Error. Due service of a copy of the within Writ of Error is hereby admitted this — day of ——, 188–. —— ——, Attorney for Defendant in Error. A copy of the within paper has been this day received at this office. Jul- 13, 1911. Henry A. Wise, U. S. Attorney. U. S. District Court, Southern District, N. Y. Filed Jul- 13, 1911. John A. Shields, Clerk.

Clerk's Certificate.

UNITED STATES OF AMERICA,
Southern District of New York, ss:

I, John A. Shields, Clerk of the Circuit Court of the United States of America, for the Southern District of New York, in the Second Circuit, by virtue of the foregoing Writ of Error, and in obedience thereto, do hereby certify, that the following pages, numbered from three to seventy inclusive, contain a true and complete transcript of the record and proceedings had in said Court in the cause of Roy A. Rainey, Plaintiff in error, against The United States of America, Defendant in error, as the same remain of record and on file in said office.

In Testimony whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, in the Second Circuit, this 26th day of July in the year of our Lord, one thousand nine hundred and eleven and of the Independence of the United States the one hundred and Thirty-sixth.

[Seal of the Circuit Court, South. Dist. New York.]

JOHN A. SHIELDS, *Clerk.*

3 *Summons.*

Form No. 16.

United States Circuit Court, Southern District of New York.

Action # 2.

UNITED STATES OF AMERICA, Plaintiff,
against
ROY A. RAINEY, Defendant.

To the above-named defendant:

You are hereby summoned to answer the complaint in this action and to serve a copy of your answer on the plaintiff's attorney within twenty days after the service of this summons, exclusive of the day of service; and in case of your failure to appear, or answer, judgment will be taken against you by default for the relief demanded in the complaint.

Witness, the Honorable Edward D. White, Chief Justice of the United States, at the Borough of Manhattan in the City [L. S.] of New York, this 12 day of January, in the year one thousand nine hundred and eleven.

JOHN A. SHIELDS, *Clerk.*

HENRY A. WISE,
U. S. Attorney, Plaintiff's Attorney.

Office and Post-office address, Room 50, U. S. Court and P. O. Building, Borough of Manhattan, New York City.

4 United States Circuit Court, Southern District of New York.

Action No. 2.

UNITED STATES OF AMERICA
vs.
ROY A. RAINEY.

Complaint.

The plaintiff above named, by Henry A. Wise, United States Attorney for the Southern District of New York, its attorney, for its complaint against the defendant above named, alleges, on information and belief, as follows:

First. That the plaintiff is a corporation sovereign.

Second. That the defendant is a citizen of the United States.

Third. That on the 1st day of September, 1910, the defendant was the managing owner of the yacht "Cassandra;" that the said yacht was, and is, a foreign built vessel, and that it was built in the Kingdom of Great Britain, that the said yacht had a gross tonnage of 1,227.17 tons; that the said yacht had not been, and was not, used or intended to be used for trade.

Fourth. That during all the times herein mentioned the following Customs regulation, duly promulgated and adopted according to law by the Secretary of the Treasury of the United States, was in full force and effect:

5 Art. 62. "Any foreign-built vessel purchased by a citizen, although prohibited from being documented, is nevertheless entitled to legal protection as property of a citizen.

The Collector may issue to any such vessel, owned by a citizen, a certificate in proper form, of the validity and filing of the bill of sale. * * *"

Fifth. That the ownership of said yacht "Cassandra" was transferred to defendant on or about the 25th day of June, 1908, as evidenced by bill of sale bearing the same date; that said bill of sale was duly recorded in the office of the Collector of the Port of New York for the Southern District of New York, on the 10th day of July, 1908, and that thereafter on the said 10th day of July, 1908, pursuant to law and the Customs regulations, a certificate was issued to the defendant in manner and substance like the standard form of such certificate which is hereto annexed, marked Schedule "A."

Sixth. That during all the times herein mentioned said certificate continued in full force and effect and the protection, privileges, immunities and advantages thereby conferred continued to be used and enjoyed by said defendant.

Seventh. That immediately upon the acquisition of said yacht by the said defendant as aforesaid, the defendant became entitled to and continuously thereafter did exercise the privilege of flying the American flag on said yacht "Cassandra."

Eighth. That on or about the 1st day of September, 1910, the

Collector of Customs at the Port of New York, that being the District nearest the residence of the defendant, fixed and deter-
6 mined the sum of Eight thousand five hundred and eighty-nine dollars ($8,589) as the sum equivalent to the tonnage tax of seven dollars ($7) per gross ton upon the use of the said yacht and thereby levied a tonnage tax in said amount upon the use of the same, in conformity with the Act of Aug. 5, 1909 (U. S. Stat. 1909, p. 112).

Ninth. That the said Collector of Customs at the Port of New York gave notice to the defendant of the levy of the said tax, and demanded payment thereof on the 1st day of September, 1910, prior to the beginning of this action, but no part thereof has been paid, and the defendant has not paid a duty of thirty-five per cent. (35%) ad valorem upon the said yacht, in lieu of the said tax.

Wherefore, plaintiff demands judgment against the defendant for the sum of Eight thousand five hundred and eighty-nine dollars ($8,589) with interest thereon from the 1st day of September, 1910, together with the costs and disbursements of this action.

HENRY A. WISE,
United States Attorney for the Southern District of New York, Attorney for the Plaintiff.

Office and Post-office address: Room 50, U. S. Court House and Post-office Building, Borough of Manhattan, City of New York.

7 SCHEDULE A.

Form of Certificate Endorsed on Bill-of-Sale of Foreign-built Vessel Purchased by a Citizen.

(Art. 62, Customs Regulations, 1908.)

CUSTOM HOUSE,
Port of New York:

I, —— ——, Deputy Collector of Customs for the Port of New York, in the State of New York, in the United States of America, do hereby certify that the within Bill-of-Sale bearing date of — of the —— of — tons registered tonnage, sold and transferred by —— —— of —— to —— —— of ——, is, in form and substance, valid and effective in law, and has been duly recorded in this office; and that the said —— —— is a citizen of the United States.

As witness my hand and the seal of this office, this — day of ——, in the year of our Lord ——.

—— ——,
Deputy Collector.

8 STATE OF NEW YORK,
County of New York,
Southern District of New York, ss:

Addison S. Pratt, being duly sworn, deposes and says that he is an assistant to the United States Attorney for the Southern Dis-

trict of New York, the attorney for the plaintiff in the within entitled action; that he has read the foregoing complaint and knows the contents thereof; that the same is true of his own knowledge, except as to the matters therein stated to be alleged on information and belief and that as to those matters he believes it to be true. That the reason why this verification is made by deponent and not by plaintiff is that plaintiff is a corporation sovereign.

That the sources of deponent's information and the grounds of his belief as to all the matters set forth in said complaint not stated upon his knowledge, are derived from communications received by him from the Collector of Customs at the Port of New York.

ADDISON S. PRATT.

Sworn to before me this 10th day of January, 1911.

[SEAL.] GEORGE J. ZENGERLE,
Notary Public, Queens Co.

Cert. # 2025 filed in N. Y. Co.

(Endorsed:) Due service of a copy of the within is hereby admitted. New York, January 19, 1911. Cipriano Andrade, Jr., Attorney for Defendant.—U. S. Circuit Court, Southern District, N. Y. Filed Jan. 20, 1911. John A. Shields, Clerk.

9 United States Circuit Court, Southern District of New York.

Action # 2.

UNITED STATES OF AMERICA
vs.
ROY A. RAINEY.

Amended Answer.

The defendant by Cipriano Andrade, Jr., his attorney, answering the complaint by this his amended answer, alleges:

First. On information and belief admits that the Customs regulation alleged and quoted in paragraph Fourth of the complaint has been promulgated and adopted by the Secretary of the Treasury, but denies that said regulation was duly promulgated according to any act of Congress.

Second. On information and belief denies that any certificate was issued to the defendant as alleged in paragraph Fifth of the complaint, but admits and alleges that the substance of the form annexed to the complaint was endorsed on the original bill of sale referred to in said paragraph Fifth.

Third. On information and belief denies each and every allegation contained in the paragraph Sixth of the complaint.

Fourth. Denies that the defendant continuously or at any
10 time exercised the privilege of flying the American flag on said yacht "Cassandra," as alleged in paragraph Seventh of the complaint.

For a second separate defence to the whole of the plaintiff's claim:

Fifth. That said yacht has at no time been, and is not now, registered, enrolled or documented as a vessel of the United States, and is not entitled to enjoy or exercise, and has never enjoyed or exercised, any rights, privileges or protection as a vessel of the United States, and has been used by the defendant outside of the waters and territorial limits or jurisdiction of the United States from time to time and at various times during the year preceding the first day of September, 1910.

Sixth. On information and belief that at the time of the passing and approval of said act of Congress as aforesaid and of the alleged levy of said annual tax upon the use of this defendant's said yatcht, pursuant to section 37 of said act, there were and ever since have been in the United States, and within its jurisdiction, a large number of yachts, pleasure-boats and vessels not used or intended to be used for trade, and not foreign-built, which were then owned or chartered for more than six months by citizens of the United States, and which were and are similar to this defendant's said yacht in all substantial respects as to construction, character and nature of property, and identical with this defendant's said yacht in all respects as to use and as being personal property of citizens of the United States, but upon which property so similarly situated no tax is imposed by the said act of Congress.

11 Seventh. That said act of Congress, in so far as it purports in and by section 37 thereof to direct the levy and collection of a tax upon this defendant's said yacht, is not a general law operating upon all citizens of the United States owning and using like property under substantially similar conditions and circumstances, and that the levy and collection from this defendant of said sum, equivalent to a tonnage tax of seven dollars per gross ton, would not constitute a levy and collection of any tax, duty, impost or excise within the true meaning of the Constitution of the United States, but would deprive this defendant of his property without due process of law, in conflict with the Fifth Article of the Amendment to the Constitution of the United States.

For a third separate defence to the whole of the plaintiff's claim:

Eighth. On information and belief that at the time of the passing and approval of said act of Congress as aforesaid and of the alleged levy of said annual tax upon the use of this defendant's said yacht, there were and ever since have been in several of the States of the United States, and within its jurisdiction, a large number of foreign-built yachts, pleasure-boats and vessels not used or intended to be used for trade, which were then owned or chartered for more than six months by citizens of the United States, and which were and are similar to this defendant's said yacht in all substantial respects as to construction, character and nature of property, and identical with this defendant's said yacht in all respects as to use and as being personal property of citizens of the United States, and

that neither the tonnage nor the value of said yachts was then
12 or now is apportioned among the several States of the United States, either according to the several numbers of said States or according to the census or enumeration of said States.

Ninth. That by virtue of the premises, the said section 37 of the act of Congress, approved August 5, 1909, under which this action is brought, is null, void and of none effect, in that said act of Congress in imposing a duty of thirty-five per centum ad valorem on foreign built yachts, lays a direct tax, which direct tax is not apportioned among the several States according to their respective numbers as required by Article 1 Section 2 Clause 3 of the Constitution of the United States; and which direct tax is not laid in proportion to the census or enumeration, as required by Article 1, section 9, clause 4 of the Constitution of the United States.

For a fourth separate defence to the whole of the plaintiff's claim:

Tenth. On information and belief that at the time of the passing and approval of said act of Congress as aforesaid and of the alleged levy of said annual tax upon the use of this defendant's said yacht, there were and ever since have been in several of the States of the United States, and within its jurisdiction, a large number of foreign-built yachts, pleasure-boats and vessels not used or intended to be used for trade, which were then owned or chartered for more than six months by citizens of the United States, and which were and are similar to this defendant's said yacht in all substantial respects as to construction, character and nature of property, and identical with this defendant's said yacht in all respects as to use and as
13 being personal property of citizens of the United States; and that some of said yachts in one State are or may be substantially equal in tonnage but not substantially equal in value to some of said yachts in other States, and that some of said yachts in one State are or may be substantially equal in value but not substantially equal in tonnage to some of said yachts in other States; and that some of said yachts in one State are or may be substantially equal in tonnage and value to some of said yachts in other States. That there is no necessary relation between the value and the tonnage of a yacht.

Eleventh. That by virtue of the premises, the said section 37 of the act of Congress, approved August 5, 1909, under which this action is brought, is null, void and of none effect, in that said act of Congress in laying upon the use of foreign-built yachts an annual sum or charge equivalent to a tonnage tax of seven dollars per gross ton is laying an indirect tax or excise, which excise is not uniform throughout the United States, as required by Article 1, Section 8, Clause 1 of the Constitution of the United States; the fact being that under said act of Congress, two or more such yachts of substantially equal tonnage, but substantially unequal value may be unequally taxed on such equal tonnage in two different States; and two or more such yachts of substantially equal value but substantially unequal tonnage may be unequally taxed on such equal value in two different States; and one or more such yachts may be

taxed in one State of the United States in a certain sum at the rate of seven dollars per gross ton, irrespective of the value thereof, and another such yacht or yachts in another State of the United States and substantially similar in value and tonnage to the said first mentioned yacht, may be taxed in a substantially different sum at the rate of thirty-five per cent of the value thereof, irrespective
14 of the tonnage thereof; whereby inequality and nonuniformity of the taxation of such yachts in different parts of the United States will result.

For a fifth separate defence to the whole of the plaintiff's claim:

Twelfth. On information and belief that the defendant's said yacht, mentioned in the complaint herein, was built in the Kingdom of Great Britain prior to the fifth day of August, 1909, and that after said yacht had been so built, and prior to the fifth day of August, 1909, defendant purchased said yacht for a valuable consideration, and that continuously since said purchase defendant has been and now is the owner and the managing owner of said yacht.

Thirteenth. Defendant repeats the allegations of paragraph Fifth hereof.

Fourteenth. On information and belief that said yacht at all the times herein mentioned was and now is a British vessel, within the scope and meaning of the hereinafter mentioned treaties.

Fifteenth. That in and by a certain treaty or convention between the plaintiff and His Brittan-ick Majesty, concluded on the third day of July, 1815, and duly ratified December 22, 1815, as extended by a certain treaty or convention between the plaintiff and His Majesty the King of the United Kingdom of Great Britain and Ireland, concluded on the 20th day of October, 1818, and duly ratified January 30, 1819, as extended by a certain treaty or convention between the plaintiff and His Majesty the King of the United Kingdom
15 of Great Britain and Ireland, concluded on the 6th day of August, 1827, and duly ratified April 2, 1828, it was provided that no higher or other duties or charges shall be imposed in any of the Ports of the United States on British vessels, than those payable in the same ports by vessels of the United States, and that it should be competent to either of the contracting parties, in case either should think fit, at any time after the twentieth day of October, 1828,—on giving due notice of twelve months to the other contracting party to annul and abrogate said convention:—and that it should, in such case, be accordingly entirely annulled and abrogated, after the expiration of the said term of notice.

Sixteenth. On information and belief, that at no time has the United States of America given due notice of twelve months, or any notice whatever, to the government of Great Britain or to the King or Queen thereof of an intention to annul or abrogate said convention.

Seventeenth. That at no time since said 3rd day of July, 1815, has any vessel of the United States, or any yacht of the United States, in any port of the United States had imposed upon it a duty or charge or sum equivalent to a tonnage tax of seven dollars per

gross ton per annum, or a duty of thirty-five per cent ad valorem, or any other charge or duty equal to or as high as the duty or charge mentioned in the complaint herein.

Eighteenth. On information and belief that it was not the intention of Congress in and by said act approved August 5, 1909, nor does any intention appear upon the face of said act of Congress, to abrogate or annul said treaties hereinbefore mentioned.

Nineteenth. That by virtue of the premises; as well as by virtue of article 6 clause 2 of the Constitution of the United States,
16 the defendant at all times, and continuously to the present time, was and now is in the full possession and enjoyment of the right, title, privilege and immunity under said treaties to be exempted and to have his said yacht exempted from the operation of said act approved August 5, 1909.

For a sixth separate defence to the whole of the plaintiff's claim:

Twentieth. That the said act approved August 5, 1909, as is apparent upon the face thereof, does not authorize any action in personam against the owner or managing owner of any yacht mentioned in said act.

For a seventh separate defence to the whole of the plaintiff's claim:

Twenty-first. That the said section 37 of the act of Congress approved August 5, 1909, is a bill for raising revenue.

Twenty-second. That said section 37 of said act of Congress did not originate in the House of Representatives.

Twenty-third. That said section 37 of said act of Congress was not an "amendment" to H. R. bill 1438, as originated in the House of Representatives, within the purview of article 1 section 7 of the Constitution of the United States.

17 Wherefore defendant prays the judgment of this court touching the several matters, rights, titles, privileges and immunities above set forth; and touching the construction and application of the Constitution of the United States in the several particulars above set forth; and touching the constitutionality or unconstitutionality and construction of said law of the United States approved August 5, 1909; and touching the validity and construction of said three several treaties.

And the defendant demands the judgment of this court dismissing the complaint herein, with the costs and disbursements hereof.

CIPRIANO ANDRADE, JR.,
Attorney for Defendant, 527 Fifth Avenue,
Borough of Manhattan, City of New York.

18 UNITED STATES OF AMERICA,
Southern District of New York, ss:

Cipriano Andrade, Jr., being duly sworn, says: That he is the attorney for the defendant above named; that the foregoing answer is true to the knowledge of deponent except as to the matters therein

stated to be alleged on information and belief, and that as to those matters he believes it to be true. That the reason why this affidavit is not made by the defendant is that the defendant is not within the Southern District of New York wherein deponent resides; that the information derived by deponent from various sources, in the course of investigations made by deponent into the matters stated in the said answer, constitute the ground of deponent's belief as to all matters not stated upon his knowledge.

CIPRIANO ANDRADE, JR.

Sworn to before me this 8th day of February, 1911.

[SEAL.]

SCOTT STEWART,
Notary Public, Westchester County.

Certificate filed in New York County.

(Endorsed:) Received Feb. 8, 1911. U. S. Attorney's Office.— U. S. Circuit Court, Southern District, N. Y. Filed Apr. 25, 1911. John A. Shields, Clerk.

19 United States Circuit Court, Southern District of New York.

Action # 2.

UNITED STATES OF AMERICA, Plaintiff,
against
ROY A. RAINEY, Defendant.

It is hereby stipulated and agreed by and between the attorneys for the respective parties hereto that this action be tried by the Court without a jury, a jury being hereby expressly waived.

Dated: New York, April 10, 1911.

HENRY A. WISE,
Attorney for Plaintiff.
C. ANDRADE, JR.,
Attorney for Defendant.

(Endorsed:) U. S. Circuit Court, Southern District, N. Y. Filed Jun- 12, 1911. John A. Shields, Clerk.

20 *Opinion.*

Circuit Court of the United States, Southern District of New York.

UNITED STATES OF AMERICA
vs.
CORNELIUS K. G. BILLINGS.

SAME
vs.
H. CLAY PIERCE.

SAME
vs.
ROY A. RAINEY.

SAME
vs.
JAMES GORDON BENNETT.

SAME
vs.
HARRIET GOELET.

SAME
vs.
C. LEDYARD BLAIR.

SAME
vs.
INVESTORS' & TRADERS' REALTY CO.

Actions at law tried (by consent) without a jury, and each brought to recover one year's tonnage tax under section 37 of the Tariff Act of 1909, defendants being severally the owners of yachts admitted or alleged to be "foreign-built."

Mr. Pratt, Assistant U. S. Attorney, for plaintiff;
Mr. Bangs for defendants Billings, Bennett, Goelet and Pierce;
Mr. Andrade for defendant Rainey;
Mr. Byrne for defendant Blair;
Mr. Miller for Investors' & Traders' Realty Co.

21 *Findings of Fact.*

(Billings case.) Defendant is a citizen of the United States and was on September 1, 1910, the owner and managing owner of the yacht Vanadis, a foreign-built vessel of a gross tonnage of 1,091.79 tons. That on or about the date last mentioned the Collector of Customs at the Port of New York levied a tax pursuant to the act above referred to of $7 per gross ton upon the use of the said yacht.

The amount of the tax so levied and determined is $7,644. Mr. Billings is not only a citizen but a resident of the United States and has his domicile in this country. Neither in 1909 nor 1910 did he actually use Vanadis in the sense of having her in commission, for as much as six months; while in that sense he did use her such use was partly within and partly without the territorial jurisdiction of the United States, but when not in commission the vessel laid up in this country.

At the time of the passing of the act in question there were and ever since have been in the United States and within its jurisdiction a large number of yachts, pleasure-boats and vessels not used or intended to be used for trade and not foreign-built, which were then owned or chartered for more than six months by citizens of the United States and which were and are similar to this defendant's yacht in all substantial respects as to construction, character and nature of property and identical with said defendant's yacht in all respects as to use and as being personal property of citizens of the United States.

22 The Vanadis was transferred to defendant on or about May 29, 1909, and her bill of sale was recorded in the office of the Collector of the Port of New York, who levied the tax in suit and whose district is nearest defendant's place of residence.

(Pierce case.) Defendant is a citizen of the United States and domiciled and resident therein. On September 1, 1910, he was the owner and managing owner of the yacht Yacona, a foreign-built vessel of a gross tonnage of 526.14 tons. On or about said last mentioned date the Collector of Customs at the Port of New York levied a tax pursuant to the statute above mentioned at the rate of $7 per gross ton upon the use of said yacht, the amount of said tax being $3,682. The yacht in question was transferred to defendant on or about June 6, 1902, and her bill of sale was recorded in the office of the Collector of the Port of Boston. The Collector of the Port of New York is the Collector of the District nearest the residence of the defendant. At the time of the levying of the said tax and for a long time before, i. e. more than a year before, the Yacona was out of commission and laid up at Brooklyn, N. Y., and was not used in the sense of being navigated or put to purposes of pleasure, by the defendant or anyone else, but defendant could have used her if he had so desired.

23 The finding as to the existence and non-taxation of a large number of non-foreign-built yachts in the United States hereinabove made in the Billings case is repeated and found in this case.

(Bennett case.) The defendant is a citizen of the United States, domiciled and resident in the Republic of France. On or about September 1, 1910, he was the owner and managing owner of the yacht Lysistrata, a foreign-built vessel of the gross tonnage of 1,942.75 tons. On or about September 1, 1910, the Collector of Customs of the Port of New York levied a tax pursuant to the statute above mentioned at the rate of $7 per ton upon the use of said yacht, and the amount of said tax was and is $13,601. Said Collector of Customs was not the Collector of the District nearest the residence

of the defendant. Said yacht Lysistrata has never at any time been within the territorial jurisdiction of the United States except for brief visits of a few days, and her headquarters, usual anchorage or mooring place when not engaged on voyages is not and never has been within the waters of the United States. The same finding as to the existence and non-taxation of other yachts not foreign-built and owned or chartered by citizens of the United States as has been hereinabove made in the Billings case is made in this case.

(Goelet case.) Defendant is a citizen of the United States domiciled and resident in the Republic of France. On or about the first day of September, 1910, she was the owner and managing owner of the yacht Namha, a foreign-built vessel of the gross tonnage of 1,739.83 tons: On or about September 1st, 1910, the Collector of Customs at the Port of New York levied a tax pursuant to the statute above mentioned at the rate of $7 per ton upon the use of said yacht, and the amount of said tax was and is $12,180. Said Collector of Customs was not the Collector of the District nearest the residence of the defendant.

24 Said yacht Nahma was originally purchased on or about November 30, 1896, by Robert Goelet, deceased (a citizen of the United States), and her bill of sale was recorded in the office of the Collector of Customs of the Port of New York. Upon the decease of Mr. Goelet his executors conveyed the said yacht to defendant by a bill of sale which was likewise recorded in the office of said Collector of Customs. The Nahma has not been in the territorial jurisdiction of the United States since 1901, and when not in commission she has laid up at Greenock, Scotland. The finding as to the existence and non-taxation of a large number of foreign-built yachts in the United States hereinabove made in the Billings case is repeated and found in this case.

(Rainey case.) Defendant is a citizen of the United States domiciled and resident therein. On September 1, 1910, he was the owner and managing owner of the yacht Cassandra, a foreign-built vessel of a gross tonnage of 1,227.17 tons. On or about said last mentioned date the Collector of Customs at the Port of New York levied a tax pursuant to the statute above mentioned at the rate of $7 per gross ton upon the use of said yacht, the amount of said tax being $8,589. The yacht in question was transferred to the defendant on or about the 25th of June, 1908, and her bill of sale was recorded in the office of the Collector of the Port of New York. The Collector of the Port of New York is the Collector of the District nearest the residence of the defendant. At the time of the levying of the said tax and for a long time before, i. e. more than a year before, the Cassandra was out of commission and laid up at New London, Conn., and there is no evidence that during that time or at any time since was the vessel navigated or put to purposes of pleasure by the defendant or anyone else, but defendant

25 could have used her if he had so desired.

The finding as to the existence and non-taxation of a large number of foreign-built yachts in the United States hereinabove found in the Billings case is repeated and found in this case.

(Blair case.) Defendant is a citizen of the United States and

domiciled and resident therein. On September 1, 1909, he was the owner and managing owner of the yacht Diana, a vessel of a gross tonnage of 785.6 tons. On or about said last mentioned date the Collector of Customs at the Port of New York assumed to levy a tax alleged to be pursuant to the statute above mentioned at the rate of $7 per gross ton upon the use of the said yacht, the amount of said tax being $5,502.

The yacht Maria was built in Glasgow, Scotland, in 1896; in 1902 she was sold to an American citizen, who re-named her the Delaware; he used her as a pleasure vessel until 1905. During Mr. Bourne's ownership of her approximately $30,000 was spent in improving and bettering the Delaware, said expenditures being exclusive of those payments properly chargeable to maintenance or upkeep. In February, 1905, while lying at Hoboken, N. J., the Delaware was burned, most of her upper works being totally destroyed, her engines so injured that they had to be dismantled, and her steel plating badly warped. So much water was pumped into her to put out the fire that she sank, though apparently there was not enough water at her berth to permit her to go out of
26 sight. The wreck passed into the hands of Mr. Chubb, apparently as agent for underwriters. That gentleman raised and rebuilt the yacht at an expense of approximately $86,000, and he re-named the re-built vessel Diana. In 1906 Mr. Chubb sold the Diana to the defendant, and between the date of his purchase and the date of levying the tax Mr. Blair has expended on the Diana for betterments and improvements approximately $34,000. Exclusive of salvage the actual expenditures for re-building of and improvements upon the wrecked Delaware amount to approximately $121,000, and Mr. Chubb paid for the wreck $35,500 after, as above noted, Mr. Bourne had expended for new construction on the Delaware, about $30,000.

At the time of the action aforesaid by the Collector of the Port of New York the defendant was a resident of Peapack, N. J., and there had his domicile, being also a citizen of the State of New Jersey. The Collector of the Port of New York is not the collector of the District nearest the residence of the defendant. The bill of sale from Mr. Chubb to defendant was recorded in the office of the Collector for the Port of New York. Defendant has largely used the Diana within the territorial jurisdiction of the United States as well as in foreign waters. The finding as to the existence and non-taxation of a large number of non-foreign-built yachts in the United States hereinabove made in the Billings case is repeated and found in this case.

(Case of Investors' & Traders' Realty Co.)

Defendant is a citizen of the United States and is a corporation whose "residence" is nearest the collection district in charge of the Collector of the Port of New York.

27 On September 1, 1909, it was the owner and managing owner of the yacht Allita, a vessel of unknown gross tonnage. On or about the said last mentioned date said Collector of Customs at the Port of New York levied a tax pursuant to the statute above

mentioned at the rate of $7 per gross ton upon the use of said yacht, the amount of said tax being $504.

The Allita was originally the Gadabout of 71.86 tons, built at Montreal, Canada. As the Algonquin she passed into the possession of J. H. Flagler in 1900. It does not appear that at the time of her transfer to Flagler she had been injured or received substantial changes in structure. Having paid $10,000 for the Algonquin, Mr. Flagler lengthened her by inserting approximately 26 ft. amidships. He also changed the shape of the stern and rebuilt the bow. The vessel had auxiliary steam, and as lengthened and enlarged the old engine, boilers and wheel were not suitable and were not used. The old boilers and engine were traded for new ones, and including the difference paid for the new propulsive power Mr. Flagler expended upward of $46,000 in changing the Algonquin, which he then renamed the Allita. In 1908 he transferred her (in the process of a real estate transaction) to the defendant Company, which has never used her as a yacht and evidently accepted the vessel only to sell again. The bill of sale from Flagler to defendant was recorded in the Collector's office of the Port of New York July 7, 1909.

28 The same finding as to the existence and non-taxation of other yachts not foreign-built and owned or chartered by citizens of the United States as has been hereinabove made in the Billings case is made in this case.

Memorandum.

The foregoing findings of fact are not intended to be exhaustive; they do not assume to do more than state what appear to me to be the material facts necessary for understanding the opinion of Noyes, J., filed in several of these cases March 8, 1911, as well as the decision about to be made on points not then argued.

If the District Attorney considers a formal finding to the effect that each of these yachts has at some time displayed either the national flag or the yacht ensign it will be made.

Of Customs regulations I think any Federal Court may take notice without finding.

As to all the constitutional points argued no opinion is expressed other than to say that I follow the decision of Noyes, J., above noted. The same is true of the questions of interpretation passed upon in said opinion, and it is therefore held that the tax is not collectible against those owners domiciled and resident abroad. Also that the tax, being upon the use of a yacht, applies to potential use, and finally that the congressional intent being clear it is not a valid objection to the tax that it is inconsistent (if it is) with our treaty with Great Britain of 1815.

29 The actions against Blair and the Investors' & Traders Realty Company raise a point not previously discussed, viz: what is meant by a foreign-built yacht.

The Blair case also requires answer to the question,—What is the force and effect of the statutory words that the tax "shall be levied and collected * * * by the Collector of Customs of the District nearest the residence of the managing owner?"

The suit against the Investors' & Traders' Company also suggests (though it was not argued) the inquiry as to how the gross tonnage by which the tax is measured is to be ascertained. Before taking up these considerations it is noted that I have found as matter of fact that Mr. Goelet and Mr. Bennett are both resident and domiciled abroad. It is believed that although many cases, of which De Meli vs. de Meli, 124 N. Y., 425, and People vs. Platt, 117 N. Y., 159 are examples,—have held these two words synonymous, that they cannot be so considered in this Court. "Domicile" is a larger word than "residence," because the latter is acquired by the former. Although "domicile" in its ordinary acceptation means the place where a person lives and has his home, yet it implies residence plus animus manendi. The Venus, 8 Cranch, at 279; Ennis vs. Smith, 14 How., 423; Mitchell vs. United States, 21 Wall., 352; Newton vs. Commissioners, 100 United States, 562. These decisions are consistent with the language of Corell vs. Railway Co., 123 Fed. Rep., 452, which points out that 'residence' is not synonymous with 'domicile,' for a man may have more than one place of residence, but he can have
but one domicile." And also with Stout vs. Leonard, 8
30 Vroom, 492, holding that "domicile is residence combined with intention." And the same distinction is maintained in Long vs. Ryan, 30 Gratton, 718, and Bradley vs. Lowry, Speer's Equity (S. C.) 25.

I.

The meaning of the phrase "foreign-built." This may be considered from three points of view:

a. What is its signification in the shipping trade and among those familiar with maritime affairs?

b. What light is cast on the inquiry by general usage as evidenced by lexicographers?

c. Are there any decisions of authority?

(*a*) No expert evidence as to the meaning of the phrase was introduced at the trial, but an investigation of congressional publications shows that it was suggested to Congress by those who petitioned for the legisation which finally became the section now under consideration. It appears from House document 1505, 60th Congress, 2d Session (Tariff Hearing, Vol. 7, p. 7526 et seq.) that a considerable number of ship chandlers, and one ship builder, petitioned for the passage of an act laying an ad valorem duty of 75% on any foreign-built yacht thereafter purchased by any citizen of the United States, and several very instructive reasons were advanced in favor of the proposed law, one of them being that the tariff would not be prohibitive because "a certain proportion of the very rich men of
America are apparently determined to possess foreign-built
31 yachts at any price without regard to circumstances." And Congress was furnished with a long list of obnoxious vessels alleged to be foreign-built and American owned, which list is thought to include every yacht now under consideration. It may fairly be presumed that in legislating upon the prayer of any portion of the ship-building community Congress used language in the sense in which it was proposed, and it is in my judgment common knowledge

that any person using the language of the sea means by a "foreign-built" vessel one originally constructed outside the United States, no matter how extensive the changes, alterations or repairs bestowed upon her here may have been.

(*b*) Anything which is built is formed "by uniting materials into a regular structure," and that which is re-built is constructed "after having been demolished."

Changing the name of the Algonquin to Allita, or of the Delaware to Diana, effected nothing. Neither of these vessels was strictly speaking even re-built, for neither had been demolished. The Allita was merely enlarged, while the Diana was both repaired and enlarged.

(*c*) It appears to me that the reasoning of The Grace Meade, Fed. Cases 15243, is plainly applicable here.

Rev. Stat. 4179 prohibits changing the name of any "vessel of the United States," i. e. of any vessel lawfully registered, enrolled or licensed pursuant to legislative authority. The object of that statute is plainly to mark and preserve the identity of any named vessel. As long as the vessel is the same the name must be the same unless changed pursuant to other (and here unimportant) statutes. That decision laid down very clearly the rules by which identity should be determined:

"It may be held as a principle that where the keel, stem and stern posts and ribs of an old vessel, without being broken
32 up and forming an intact frame, are built upon as a skeleton, the case is one of an old vessel rebuilt and not of a new vessel. Indeed without regard to the particular parts re-used, if any considerable part of the hull and skeleton of an old vessel in its intact condition, without being broken up is built upon, the law holds that in such a case it is the old vessel rebuilt and not a new vessel."

The Diana and the Allita in their present condition are either foreign-built or home-built. If they are home-built they must have been constructed when Messrs. Flagler and Chubb respectively expended such extraordinary sums on them. The same vessel can only be built once,—she may be rebuilt many times, but that does not destroy identity under the decision quoted. If they were not new vessels and new vessels in the technical sense of that word, when they were respectively put into commission after lengthening the Algonquin and after the fire on the Delaware, then they are the same vessels as they were before, however greatly changed in outward appearance, in value or material. If these two yachts had been originally home-built, and that had been done to them which was done, could their respective owners have given new names to them without due application to the Commissioner of Navigation? Plainly not under the language of the decision above quoted. And if the identity of the vessels was not sufficiently destroyed to authorize re-christening if vessels of the United States they must remain foreign-built. Even American re-building cannot change that. It is therefore held that both the Allita and the Diana are foreign-built yachts as that phrase is used in the statute under consideration.

33

II.

The force of the phrase designating the officers by whom the tax "shall be levied and collected."

However shadowy in practice the difference is between a tax upon the potential use of a yacht and the yacht itself,—especially when such tax may be perpetually commuted by the payment of an ad valoreb duty,—it is admittedly essential to the Government's position that the taxation be directed against the privilege of use, and therefore accessible to and collectable from the personal user.

It is then highly appropriate that, like almost every other personal tax, the place of taxation shall be the residence of the person taxed, and such is the plain direction of the statute. It is therefore obvious to me that when the act declares that a particular Collector shall levy and collect the tax, it means that he must do something by way of apprising the person who is called upon to pay of the claim made.

It seems elementary that if one particular officer is charged with the duty, no other officer can lawfully perform that duty.

The word "levy" in law has had many meanings attributed to it (see a collection of them; Words and Phrases, Tit. "Levy"), but nothing suitable to any meaning given was done by the Collector nearest the residence of Mr. Blair. Whatever was done was the act of the corresponding functionary in New York. It is not for the defendant to declare what is necessary; it is enough that the

34 designated official did nothing, so that the Government to prevail in this action must assert (as is done arguendo) that if *in* any notice of the tax is given to the yacht owner and he does not pay, an action such as this can be maintained. For this claim no basis is perceived.

III.

The measurement of tonnage. The complaint against the Investors' & Traders' Company alleges that the Collector of Customs "duly levied upon the use of the said yacht * * * a sum equivalent to a tonnage tax of $7 per ton, to wit $504." This is evidently $7 a ton on the original tonnage of the vessel. It is common knowledge that the result of what was done to the Allita was to increase her tonnage; yet in her last recorded bill of sale she is still described as being of the same tonnage that she was when she was 26 ft. shorter.

The fact appears to be that the tonnage has been taken from her documenting, and the documents not being required by any statute of the United States have been continued without any re-measurement.

This tax is therefore incorrect, but as it is plainly less than the Government would be entitled to demand, the defendant is not in a position to object.

The contentions of several counsel that the tax should be apportioned either in respect of time or in respect of material

35 have not been overlooked, but of them it is enough to say that any such interpretation of the statute amounts in my

judgment to a judicial amendment thereof. It may be a very just and desirable amendment, but is, if not wholly beyond the power of any Court, entirely beyond the proper scope of action of a trial court.

Decision.

In United States vs. Billings judgment is directed for the plaintiff;
In United States vs. Pierce judgment is directed for the plaintiff;
In United States vs. Rainey judgment is directed for the plaintiff;
In United States vs. Bennett judgment is directed for defendant;
In United States vs. Goelet judgment is directed for defendant,
In United States vs. Blair judgment is directed for defendant;
In United States vs. Investors' & Traders' Realty Company judgment is directed for plaintiff.

C. M. HOUGH, *D. J.*

5/1/11.

(Endorsed:) U. S. Circuit Court, Southern District, N. Y. Filed May 1, 1911. John A. Shields, Clerk.

36 United States Circuit Court, Southern District of New York.

Action No. 2.

UNITED STATES OF AMERICA, Plaintiff,
vs.
ROY A. RAINEY, Defendant.

Decision.

The issues of fact raised by the answer of the defendant herein coming on to be tried by this Court at a regular term thereof held by the undersigned without a jury, a jury having been waived by both parties, and having been tried on the 10th day of April, 1911, and the allegations and evidence of the parties having been heard; now, after hearing Addison S. Pratt, Esq., Assistant United States Attorney for the Southern District of New York, of counsel for the plaintiff, and C. Andrade, Jr., Esq., of counsel for the defendant, and due deliberation having been had thereon, I decide and find as follows:

Findings of Fact.

1. Defendant is a citizen and resident of the United States and has his domicile in the United States. On the 1st day of September, 1910, he was the owner and managing owner of the steam yacht "Cassandra."

2. The said steam yacht "Cassandra" was built in the Kingdom of Great Britain in the year 1908 and its gross tonnage on the said

1st day of September, 1910, was 1,227.17 tons. It had not
37 been, and was not on the said 1st day of September, 1910, used or intended to be used for trade.

3. The defendant acquired title to the said steam yacht "Cassandra" on the 25th day of June, 1908, by a bill of sale from Robert Lyons Scott, of Silwood, Greenock, Scotland, dated on the said day.

4. On the 10th day of July, 1908, the defendant caused the bill of sale to be recorded in the office of the Collector of Customs of the Port of New York, in Book 1 of Foreign Built Vessels, page 175, and on the 10th day of July, 1908, the said Collector endorsed on the said bill of sale a certificate in the following form, and thereafter returned the bill of sale to the defendant:

Form of Certificate Endorsed on Bill of Sale of Foreign-Built Vessel Purchased by a Citizen.

CUSTOM HOUSE,
Port of New York:

I, J. W. Johnson, Deputy Collector of Customs for the Port of New York, in the State of New York, in the United States of America, do hereby certify that the within Bill of Sale bearing date June 25th, 1908, of the steam yacht "Cassandra" of 551.71 tons registered tonnage, sold and transferred by Robert Lyons Scott, of Silwood, Greenock, to Roy Alvin Rainey, of Lakewood, New Jersey, is, in form and substance, valid and effective in law, and has been duly recorded in this office; and that the said Roy Alvin Rainey is a citizen of the United States.

As witness my hand and the seal of this office, this 10th day of July, in the year of our Lord one thousand nine hundred and eight.

[SEAL.] J. W. JOHNSON,
Deputy Collector.

5. On the 2nd day of January, 1908, Hon. George B. Cortelyou, Secretary of the Treasury of the United States, established
38 the following regulation for the information and guidance of officers of the customs, which regulation has ever since been in full force and effect.

Art. 62. Certificate of Protection.—Any foreign built vessel purchased by a citizen, although prohibited from being documented, is nevertheless entitled to legal protection as property of a citizen.

The collector may issue to any such vessel, owned by a citizen, a certificate in proper form, of the validity and filing of the bill of sale. A separate record will be kept of these vessels, and in the tonnage returns they will be reported in a separate column, under the head of "Foreign-built or undocumented vessels owned by citizens of the United States."

6. During the period from the said 25th day of June, 1908, the date when the defendant purchased the said yacht, to the 1st day of September, 1910, the said yacht was used by the defendant both in the waters of the United States and in the waters of foreign coun-

tries, as well as on the high seas, and in the year immediately preceding the 1st day of September, 1910, the said yacht was used by the defendant continuously in the waters of the United States, except for the period from June 20th, 1910, to July 30th, 1910, when she was used by the defendant on a cruise to the Gulf of St. Lawrence.

7. During the period from the 4th day of July, 1908, to the said 1st day of September, 1910, the said yacht flew the American yacht ensign, except that she flew the American flag on Sundays while at Marseilles, France, from the 9th day of November, 1908, to the 15th day of February, 1909.

8. On or about the 1st day of September, 1910, the Collector of Customs at the Port of New York levied a tax under Section 37 of the Tariff Act of August 5th, 1909, of $7.00 per gross ton upon the use of the said yacht, and gave notice to the defendant and demanded payment thereof. The amount of the said tax was
39 the sum of $8,589 and has not been paid, nor has defendant paid a duty of 35 per cent. ad valorem upon the said yacht in lieu of the said tax. The district of the said Collector was the district nearest the residence of the defendant.

9. The said yacht has never been registered, enrolled or documented as a vessel of the United States.

10. At the time of the passage of the said Tariff Act of August 5th, 1909, and on the said 1st day of September, 1910, there were, and ever since have been, in the United States, and within its jurisdiction, a large number of yachts, pleasure-boats and vessels, not used or intended to be used for trade, and not foreign-built, which were then owned or chartered for more than six months by citizens of the United States, and which were and are similar to the defendant's said yacht in all substantial respects as to construction, character and nature of property, and identical with the said yacht in all respects as to use and as being personal property of citizens of the United States, but upon the use of which property so similarly situated no tax is imposed by the said act of Congress and that no such tax has in fact been imposed upon such yachts not foreign-built. Some of said yachts in one State are substantially equal in tonnage but not substantially equal in value to some of said yachts in other States, and some of said yachts in one State are substantially equal in value but not substantially equal in tonnage to some of said yachts in other States, and some of said yachts in one State are substantially equal in both tonnage and value to some of said yachts in other States. There is no necessary relation between the
40 value and the tonnage of a yacht. Neither the tonnage nor the value of said yachts was on the said 5th day of August, 1909, nor since, apportioned among the several States either according to the several numbers of the said States or according to the census or enumeration of said States.

11. The plaintiff has never given any notice to the Government of Great Britain, or to the King or Queen thereof, of its intention to annul or abrogate the British Treaty of July 3rd, 1815, as extended by the Treaties of October 20th, 1818, and August 6th, 1827.

12. At no time since the said 3rd day of July, 1815, has any vessel of the United States had imposed upon it in any port of the United States a duty or charge or sum equivalent to a tonnage tax of seven dollars per gross ton per annum or to a duty of 35 per cent. ad valorem, or any other charge or duty equal to or as high as the duty or charge referred to in said Section 37 of the Tariff Act of August 5th, 1909.

13. On the 25th day of August, 1894, the Parliament of the Kingdom of Great Britain passed an Act known as the Merchant Shipping Act, 1894 (57 and 58 Vict. ch. 60), which was duly approved by the Queen of Great Britain, Sections 1 and 69 of which were in full force and effect at all the times mentioned herein and are as follows:

1. A ship shall not be deemed to be a British ship unless owned wholly by persons of the following description (in this Act referred to as persons qualified to be owners of British ships); namely,—

(*a*) Natural-born British subjects;

(*b*) Persons naturalized by or in pursuance of an act of Parliament of the United Kingdom, or by or in pursuance of an Act or ordinance of the proper legislative authority in a British possession;

41 (*c*) Persons made denizens by letters of denization; and

(*d*) Bodies corporate established under and subject to the laws of some part of Her Majesty's dominions, and having their principal place of business in those dominions:

Provided that any person who either—

(*i*) being a natural-born British subject has taken the oath of allegiance to a foreign Sovereign or State or has otherwise become a citizen or subject of a foreign State; or

(*ii*) has been naturalised or made a denizen as aforesaid;

shall not be qualified to be owner of a British ship unless, after taking the said oath, or becoming a citizen or subject of a foreign State, or on or after being naturalised or made denizen as aforesaid, he has taken the oath of allegiance to Her Majesty the Queen, and is during the time he is owner of the ship either resident in Her Majesty's dominions, or partner in a firm actually carrying on business in Her Majesty's dominions.

69.—(1.) If a person uses the British flag and assumes the British national character on board a ship owned in whole or in part by any persons not qualified to own a British ship, for the purpose of making the ship appear to be a British ship, the ship shall be subject to forfeiture under this Act, unless the assumption has been made for the purpose of escaping capture by an enemy or by a foreign ship of war in the exercise of some belligerent right.

42 *Conclusions of Law.*

1. Section 37 of the Tariff Act of August 5th, 1909, is valid and not in conflict with the Constitution of the United States, or any portion thereof, and the tax imposed thereby is not unreasonably arbitrary or discriminatory. It is not a direct tax but an excise and

is geographically uniform. It does not deprive the defendant of his property without due process of law.

2. The said steam yacht "Cassandra" is a foreign-built yacht within the meaning of said Section 37 of the Tariff Act of August 5th, 1909.

3. The said steam yacht "Cassandra" is not entitled to be registered, enrolled or documented as a vessel of the United States.

4. The said tax of $8,589 was duly and lawfully levied under the said Act by the Collector of Customs of the Port of New York on the 1st day of September, 1910, against the defendant on the use of the said yacht.

5. The said yacht, after her purchase by the defendant on the said 25th day of June, 1908, lost her character as a British vessel, and she is not now and, since the 25th day of June, 1908, has not been a British vessel within the meaning of the Treaty with Great Britain of July 3rd, 1815, as extended by the Treaties of October 20th, 1818, and August 6th, 1827, nor has the defendant, as her owner, acquired under the said Treaty, or under Article 6, Clause 2, of the Constitution of the United States, or any other Article or Clause thereof, any right, title, privilege or immunity to be exempted or have his said yacht exempted from the operation of said Section 37 of the Tariff Act of August 5th, 1909.

43 6. The plaintiff is entitled to judgment against the defendant for the sum of $8,589, with its costs and disbursements, but without interest, and I direct judgment accordingly.

Dated, New York, July 5, 1911.

C. M. HOUGH, *D. J.*

(Endorsed:) U. S. Circuit Court, Southern District N. Y. Filed Jul- 5, 1911. John A. Shields, Clerk.

44 United States Circuit Court, Southern District of New York.

Action No. 2.

UNITED STATES OF AMERICA, Plaintiff,

vs.

ROY A. RAINEY, Defendant.

Exceptions of Defendant to the Decision and Findings of the Court.

And now comes the defendant Roy A. Rainey and makes and files the following exceptions to the decision and findings of the learned court heretofore filed herein:

1.

Defendant excepts to the first conclusion of law, which conclusion of law is in the following terms:

"1. Section 37 of the Tariff Act of August 5th, 1909, is valid and not in conflict with the Constitution of the United States, or

any portion thereof, and the tax imposed thereby is not unreasonably arbitrary or discriminatory. It is not a direct tax but an excise and is geographically uniform. It does not deprive the defendant of his property without due process of law."

2.

Defendant excepts to the fourth conclusion of law, which conclusion of law is in the following terms:

45 "4. The said tax of $8,589 was duly and lawfully levied under the said Act by the Collector of Customs of the Port of New York on the 1st day of September, 1910, against the defendant on the use of the said yacht."

3.

Defendant excepts to the fifth conclusion of law, which conclusion of law is in the following terms:

"5. The said yacht, after her purchase by the defendant on the said 25th day of June, 1908, lost her character as a British vessel, and she is not now and, since the 25th day of June, 1908, has not been a British vessel within the meaning of the Treaty with Great Britain of July 3rd, 1815, as extended by the Treaties of October 20th, 1818, and August 6th, 1827, nor has the defendant, as her owner, acquired under the said Treaty, or under Article 6, Clause 2, of the Constitution of the United States, or any other Article or Clause thereof, any right, title, privilege or immunity to be exempted or have his said yacht exempted from the operation of said Section 37 of the Tariff Act of August 5th, 1909."

4.

Defendant excepts to the sixth conclusion of law, which conclusion of law is in the following terms:

"6. The plaintiff is entitled to judgment against the defendant for the sum of $8,589, with its costs and disbursements, but without interest, and I direct judgment accordingly."

Dated, New York, July 7, 1911.

C. ANDRADE, JR.,
Attorney for Defendant, 527 Fifth Avenue,
Borough of Manhattan, City of New York.

(Endorsed:) U. S. Circuit Court, Southern District N. Y. Filed Jul- 12, 1911. John A. Shields, Clerk.

46 United States Circuit Court, Southern District of New York.

Action No. 2.

UNITED STATES OF AMERICA, Plaintiff,
vs.
ROY A. RAINEY, Defendant.

The issues in this action having duly come on for trial before Hon. Charles M. Hough, District Judge, at a Stated Term of this Court held at the United States Court House and Post Office Building, in the Borough of Manhattan, City, County and State of New York, on the 10th day of April, 1911, without a jury, a jury having been waived by consent of both parties in open Court, and the Court, after due deliberation, having directed judgment in favor of the plaintiff and against the defendant for the sum of Eight Thousand five hundred and eighty-nine dollars ($8,589.00) with costs and disbursements, and having on the 5th day of July, 1911, duly made and filed its decision in favor of the plaintiff and against the defendant, containing a statement of the facts found and the conclusions of law thereon, and directing judgment in favor of the plaintiff and against the defendant for the sum of Eight thousand five hundred and eighty-nine dollars with costs and disbursements, but without interest.

Now, on motion of Henry A. Wise, United States Attorney for the Southern District of New York, Attorney for the plaintiff, it is

Ordered and adjudged, that the plaintiff have judgment against the defendant for the sum of Eight thousand five hundred and eighty-nine dollars ($8,589.00) without interest, but with its
47 costs and disbursements, to be taxed by the Clerk of this Court and amounting as taxed to the sum of $23 97/100 and making the total sum of $8,612.97/100 and that execution issue therefor.

Dated July 12, 1911.

Judgment signed this 12th day of July, 1911.

JOHN A. SHIELDS, *Clerk.*

(Endorsed:) U. S. Circuit Court, Southern District, N. Y. Filed Jul- 12, 1911, 4.45 P. M. John A. Shields, Clerk.

48 *Bill of Exceptions.*

Circuit Court of the United States, Southern District of New York.

Before Hon. Chas. M. Hough, J.

Action # 2.

UNITED STATES
vs.
ROY A. RAINEY.

Case and Exceptions on Writ of Error.

NEW YORK, *April* 10, 1911.

Appearances:

Henry A. Wise, U. S. Attorney, for Government.
Addison S. Pratt, Ass't U. S. Attorney, of Counsel.
C. Andrade, Jr., for the Defendant.

Trial by jury is waived.

Mr. PRATT: If your Honor please, this case is an action brought to collect the yacht tax for the year September 1, 1910. The
49 action brought for the tax which was to be levied and collected September 1, 1909, came up before Judge Noyes on demurrer to the answer of the defendant. In the cases for 1910 the complaint was drawn somewhat differently from the complaint for the year 1909. There were certain things in the complaint which the defendant did not or would not admit. So it comes up on this calendar. There is no issue of fact. In fact the facts are very brief—principally, what is in the complaint.

The first, second and third paragraphs of the complaint, if your Honor will notice, are admitted. The fourth paragraph is admitted, except that the defendant denies the due promulgation of the customs regulations referred to.

Now I understand that the defendant will stipulate that on the second day of January, 1908, Hon. George B. Cortelyou, Secretary of the Treasury, established the regulations which are printed in the book which I hold in my hand, entitled "Customs Regulations, 1908, Treasury Department," and that among those regulations is Regulation 62, a copy of which is set forth in paragraph fourth. So that the only question remaining is whether or not as a matter of law the Secretary of the Treasury had the right to promulgate that regulation.

Mr. ANDRADE: Yes, we admit that.

This regulation is printed in full in Finding No. 5 in the Decision.

Now, as to the fifth paragraph, the defendant denies that this certificate was issued to the defendant, but alleges that it was endorsed on the back of the bill of sale.

I wish to offer in evidence a certified copy of the bill of sale from which it appears that the certificate in accordance with Article 62 of the Customs Regulations of 1899 was endorsed on the within bill of sale. I understand that the defendant will admit that the
50 certificate so endorsed is in manner and form like the certificate annexed to the complaint and marked Schedule A, and also attached to the certified copy of the bill of sale. Simply the blanks to be filled in.

Mr. ANDRADE: Yes, we concede that.

This certificate is printed in full in Finding No. 4 in the Decision.

Said bill of sale is received in evidence as Government's Exhibit 1.

"*Bill of sale* (*Individuals or Joint Owners*).

Official number.	Name of ship.	No., date and port of registry.	Whether a sailing or steamship.	Horse power of engines, if any.
127,539	Cassandra	$\frac{11}{1908}$ Greenock	Steam	N. H. P. 180 D. H. P. 2,500

	Feet.	Tenths.	Number of tons.
Length from forepart of stem, under the bowsprit, to the aft side of the head of the stern post	254	...	Gross.....1,227.17 Registered.....551.71
Main breadth to outside of plank	33	....	
Depth from top of deck at side amidships to bottom of keel	18	6	

"I, Robert Lyons Scott, Silwood, Greenock in consideration of the Sum of One Pound Sterling and other valuable considerations paid to me by Roy Alvin Rainey of Lakewood, New Jersey, U. S. A., the Receipt whereof is hereby acknowledged, transfer sixty-four
51 shares in the Ship above particularly described, and in her boats, guns, ammunition, small arms, and appurtenances, to the said Roy Alvin Rainey.

"Further, I the said Robert Lyons Scott, for myself and my heirs, covenant with the said Roy Alvin Rainey and his assigns, that I have power to transfer in manner aforesaid the premises hereinbefore expressed to be transferred and that the same are free from incumbrances.

"In witness whereof I have hereunto subscribed my name and affixed my seal this twenty-fifth day of June, one thousand nine hundred and eight.

(Signed) R. L. SCOTT. [SEAL.]

Executed by the above-named Robert Lyons Scott in the presence of

(Signed) JAMES HOPE,
Accountant, 28 *Patrick Street, Greenock.*

"I, James Andrew Love, Consular Agent of the United States for the Port of Greenock, Scotland, do hereby certify that the within Bill of Sale bearing date the twenty-fifth day of June, Nineteen hundred and eight years, of the Steam Yacht 'Cassandra,' official number 127,539, Gross Tonnage 1,227.17 Tons, Registered Tonnage 551.17 tons, sold and transferred by Robert Lyons Scott, Gentleman, Silwood, Greenock, in the County of Renfrew, to Roy Alvin Rainey, Lakewood, New Jersey, U. S. A., has been proved satisfactorily to me to have been duly executed by the subscribing party. And I further certify that Roy Alvin Rainey therein mentioned as purchaser of said vessel is a citizen of the United States.

"As witness my hand and seal of the Consular Agency this twenty-seventh day of June in the year of our Lord One thousand nine hundred and eight.

[Consular Seal.]

(Signed) JAS. A. LOVE,
American Consular Agent,
Greenock, Scotland.

Consular $2 Fee Stamp.

"Received for record, 10 July, 1908, at 10 h. 30 m. A. M.
"JNO. A. SCARLET,
"R. Clerk.

52 "Certificate in accordance with Article 62, Customs Regulations of 1899, indorsed on the within Bill of Sale.

"July 10, 1908,
"J. A. S.

"PORT OF NEW YORK, COLLECTOR'S OFFICE.

"I Hereby Certify the within to be a true copy of the record of the Bill of Sale received for record in this office, July 10th in the year 1908, and recorded in book F. B. V., page 175.

"Given under my hand, and the seal of the Collector, this 6th day of March, in the year 1911.

"J. N. JOHNSON,
"Deputy Collector.

J. S. M.
"Compared by B. B. J. S. M.

Mr. PRATT: The sixth paragraph is denied, but as I take it, that is purely a conclusion of law, and it presents no issue of fact whatever.

The seventh paragraph is covered by a stipulation which will be submitted by the defendant with regard to his case, but which so far as this paragraph is concerned, is to the effect that at all times since July 4th, 1908, the Cassandra, flew the American yacht ensign, except that it flew the American flag on Sundays while at Marseilles, France, from the 9th of November, 1908, until the 15th of February, 1909. The yacht itself appears from the bill of sale to have been built and purchased by the defendant on June 25, 1908.

The rest of the complaint is admitted, and that closes the Government's case.

Government rests.

Mr. ANDRADE: If the Court please, we move to dismiss on the plaintiff's evidence, on the following grounds:

53 1. That the complaint fails to set forth facts sufficient to constitute a cause of action.

2. That the plaintiff has failed to prove facts sufficient to constitute a cause of action.

3. That Section 37 of the Act of Congress, approved August 5, 1909, under which this action is brought, does not levy a tax, but deprives the defendant of his property without due process of law, in contravention of the fifth amendment to the Constitution of the United States.

4. That the 35 per cent duty contemplated by Section 37 of said Act is a direct tax and void, because not apportioned, in contravention of Article 1 of Section 2, and Article 1 of Section 9 of the Constitution of the United States.

5. That the $7 per ton tax contemplated by Section 37 of said Act is an excise or indirect tax, and void for want of uniformity, in contravention of Article 1 of Section 8 of the Constitution of the United States.

6. That section 37 of the said Act does not authorize any action in personam against the owner or managing owner of any yacht.

7. That Section 37 of the said Act is void, as it is a bill for raising revenue, and it originated in the Senate and not in the House of Representatives, in contravention of Article 1, Section 7 of the Constitution of the United States.

The COURT: Those several motions are denied, and it will be taken under advisement.

Mr. ANDRADE: We pray an exception to the ruling of the Court.

Mr. ANDRADE: If your Honor please, we now offer in evidence two stipulations. Shall I read them?

The COURT: Yes.

Mr. Andrade read in evidence stipulation which is marked

54 Exhibit 2, as follows:

"United States Circuit Court, Southern District of New York.

Action No. 2.

UNITED STATES OF AMERICA, Plaintiff,
against
ROY A. RAINEY, Defendant.

Stipulation.

"It is hereby stipulated and agreed by and between the attorney for the plaintiff and the attorney for the defendant that the steam yacht Cassandra, mentioned in the complaint herein, was engaged

in the following voyages and located in the following places at the dates hereinafter mentioned.

1908.
July 4. Left Gourock Bay, Scotland, on a voyage to Norway and Scotland.
Aug. 15. Left Scotland for the United States.
Aug. 24. Arrived in United States waters and remained in United States waters until October 26th when it left United States for Marseilles, France.
Nov. 10. Arrived at Marseilles, France.
1909.
Feb. 22. Left Marseilles, France, on a voyage in the Mediterranean Sea.
June 24. Left Marseilles, France, on a cruise to Madeira and the United States.
July 8. Arrived in United States waters and remained in United States waters until June 20, 1910, when it left United States for voyage to Gulf of St. Lawrence.
July 30. Arrived in United States waters and remained in United States waters until October 18th, 1910, when it was laid up for winter at New London, Connecticut, and laid up for the winter.

"That the said steam yacht Cassandra at this time is still at New London, as aforesaid. That at all times since July 4th, 1908, the said steam yacht Cassandra has flown the American yacht ensign, except that the steam yacht Cassandra flew the American flag on Sundays while at Marseilles, France, from the 9th day of
55 November, 1908, to the 15th day of February, 1909.

"It is further stipulated that the plaintiff's attorney may use for the purpose of evidence the printed copies of the Treasury Department's regulations regarding vessels, with the same force and effect as duly certified copies thereof, but without prejudice to the defendant's right to object to the materiality thereof.

"Dated, New York, March 30th, 1911.

"HENRY A. WISE,
"Attorney for Plaintiff.
"C. ANDRADE,
"Attorney for Defendant."

Mr. ANDRADE: I may say in that connection, as Mr. Pratt did not offer those in evidence, I had no opportunity to object to their materiality at that time. I now make an objection to them, to the materiality of the customs regulations promulgated by Secretary Cortelyou on the ground that they were not, as a matter of law, authorized at that time by any act of Congress then in force.

The COURT: Do you maintain that the regulation was in violation of any law, in other words, you object that the Secretary of the Treasury must find direct statutory warrant for everything he did in the way of customs regulations? Or, perhaps the same thing, do you contend that he made customs regulations which are not in

violation of any existing statute, although not directly authorized by any such statute.

Mr. ANDRADE: We will take the broader ground, if it please your Honor, that the regulation there promulgated as a matter of law was in violation of the existing laws of the United States. And also, as a second ground, that it was not in fact authorized.

The COURT: Do you assume that it was in violation of the law, and therefore null and void? What difference does it make in this litigation?

56 Mr. ANDRADE: Now, your Honor, that takes us pretty far into the merits. I did not come this morning prepared to argue the case on the law. As already stated, a Judge of this Court has held that this yacht tax is good and valid as a matter of law, and for that reason I would assume that perhaps the same ruling would be made on this trial. If your Honor desires an extended argument, I will submit a brief covering these various points. I will outline to your Honor briefly what the contention is in that regard. The yacht owners have argued that this Act of Congress undertakes to levy a tax on property which in some cases is without the jurisdiction of the court; that there is no quid pro quo in that situation, and that even the Congress of the United States has not the power to tax the property of an American citizen unless that property is locally within the jurisdiction of the United States government.

Now in two extreme cases among these tax cases, the cases of Mr. Bennett and Mrs. Goelet, both of whom reside abroad, and neither of whose yachts was in the United States since the passage of the Act, the learned judge who heard the demurrer held they clearly were not responsible for the tax. It therefore becomes a question as to just how far that doctrine ought to be carried; as to whether a continuous residence in United States waters is necessary; as to whether a location of a yacht on the high seas but not in any territorial jurisdiction at all, will fulfil the requirements. Now in that argument your Honor will perceive, that if it is shown, for example, that the yacht raises the American flag, she may thereby be said constructively to invoke the protection of the United States government. That is the argument of the District Attorney, and that is the reason that so much emphasis has been laid by the government on the raising of the American flag on that yacht for sometime in Marseilles, France.

57 Now this regulation of the Treasury Department, as I understand it, undertakes to say that if the yacht owner, the owner of a foreign built yacht, raises the American flag, he thereby is entitled to protection of that property as the property of an American citizen.

The COURT: You need not argue that.

Mr. ANDRADE: Now, in that line, in the line of that argument, the government says that this flag, if we flew it, acquired a graver significance by reason of this departmental regulation, which says we might fly it. And we say no. That under the laws of the United States as they stood at that time, we could have flown any flag we pleased on that yacht, and that would not have settled the status, because it was settled law at that time that the boat would not be

an American vessel. And that is the reason why we object to the materiality in point of law of this regulation. We concede that it was in fact made by Hon. George B. Cortelyou. We do concede that the defendant flew the American flag on the dates mentioned.

The COURT: He recorded the bill of sale, or made an endorsement of the bill of sale in the customs, but you say that that was a nullity.

Mr. ANDRADE: Yes, sir, we think it was.

Mr. PRATT: I wish to object to the materiality of this evidence as to the whereabouts of this boat during the period mentioned.

The COURT: I overrule that objection.

Exception by the Government.

Mr. ANDRADE: I will now read the other stipulation.

Counsel for the defendant here read in evidence stipulation marked Exhibit 3, as follows:

"United States Circuit Court, Southern District of New York.

58 Action No. 2.

UNITED STATES OF AMERICA, Plaintiff,
against
ROY A. RAINEY, Defendant.

Stipulation.

"It is hereby stipulated and agreed by and between the attorney for the plaintiff and the attorney for the defendant:

"1. That defendant's said yacht Cassandra has at no time been, and is not now, registered, enrolled or documented as a vessel of the United States.

"2. That on August 5, 1909, there were and ever since have been in the United States, and within its jurisdiction, a large number of yachts, pleasure-boats and vessels not used or intended to be used for trade, and not foreign-built, which were then owned or chartered for more than six months by citizens of the United States, and which were and are similar to this defendant's said yacht in all substantial respects as to construction, character and nature of property, and identical with this defendant's said yacht in all respects as to use and as being personal property of citizens of the United States, but upon which property so similarly situated no tax is imposed by the said Act of Congress; and that neither the tonnage nor the value of said yachts was then or now is apportioned among the several States of the United States, either according to the several numbers of said States or according to the census or enumeration of said States; and that some of said yachts in one State are substantially equal in tonnage but not substantially equal in value to some of said yachts in other States; and that some of said yachts in one State are substantially equal in value but not substantially equal in tonnage to some of said yachts in other States;

and that some of said yachts in one State are substantially
59 equal in tonnage and value to some of said yachts in other States. That there is no necessary relation between the value and the tonnage of a yacht.

"3. That the defendant's said yacht, mentioned in the complaint herein, was built in the Kingdom of Great Britain prior to the fifth day of August, 1909, and that after said yacht had been so built, and prior to the fifth day of August, 1909, defendant purchased said yacht for a valuable consideration, and that continually since said purchase defendant has been and now is the owner and the managing owner of said yacht.

"4. That at no time has the United States of America given due notice of twelve months, or any notice whatever, to the government of Great Britain or to the King or Queen thereof of an intention to annul or abrogate the British Treaty of July 3, 1815, as extended by the treaties of October 20, 1818, and August 6, 1827.

"5. That at no time since said 3rd day of July, 1815, has any vessel of the United States, or any yacht of the United States, in any port of the United States had imposed upon it a duty or charge or sum equivalent to a tonnage tax of seven dollars per gross ton per annum, or a duty of thirty-five per cent ad valorem, or any other charge or duty equal to or as high as the duty or charge mentioned in the complaint herein.

"Dated New York, March 30th, 1911.

"HENRY A. WISE,
"Attorney for Plaintiff.
"C. ANDRADE, JR.,
"Attorney for Defendant."

Mr. PRATT: I make the same objection, your Honor, to the contents of all this stipulation on the ground that it is immaterial.

Objection overruled. Exception by the Government.

60 Mr. ANDRADE: If the Court please, the defendant rests and the defendant renews the motion, now made on all the evidence, to dismiss the complaint on the several grounds already recited.

The COURT: That motion I will take under advisement.

Exception by defendant.

Mr. PRATT: I would like to offer in evidence certain sections of the Merchant Shipping Act of Great Britain. Section 1 and Section 69, I think, are the most material.

The COURT: What date?

Mr. PRATT: 1894.

Mr. ANDRADE: We are entirely willing that Mr. Pratt may introduce them as being statutes of Great Britain.

The COURT: This statute that you refer to is the Merchant Shipping Act of 1894?

Mr. PRATT: Yes. I think it has been amended once, but I am not positive as to that.

The COURT: It may be stated as the Merchant Shipping Act of 1894.

Mr. PRATT: It is the first Merchant Shipping Act of 1894. But as I said before, I think it has been amended in some particulars. Section 1 is the section which describes the vessels that are entitled to British registry. Section 69 is the section which relates to forfeitures of vessels not entitled to British Registry, flying the British flag.

These sections are printed in full in Finding No. 13 in the Decision.

Mr. ANDRADE: We object to that Act and its amendment as immaterial, because passed after the treaties already referred to in the stipulation. The point was made by the defendant on the first hearing before Judge Noyes—I don't wish to go into it at length,—

61 that this treaty of 1815 contemplates vessels not only as instruments for carrying commerce, but also as articles of commerce themselves. It was a commercial treaty. And that is one of the things that we said that that treaty intended to do, was to protect builders of British vessels. The situation has arisen since the passage of this Act, that the British builders have lost a large volume of business, which they previously had, in building American yachts. The year the Cassandra came out, I think there was considerably over a million dollars spent there for that purpose, building boats for American owners. Mr. Plant had his built the same year, and two or three others.

Mr. PRATT: That is all of the case.

Both sides moved for judgment.

Decision reserved.

Thereafter the Court rendered its decision in which it directed judgment for the plaintiff against the defendant for the relief demanded in the complaint, with costs but without interest, to which the defendant duly excepted.

62 It is hereby stipulated and agreed that the foregoing is a true and correct bill of exceptions, and contains all the testimony and evidence offered at the trial, and we consent that it be settled and allowed.

HENRY A. WISE,
Attorney for Plaintiff.
C. ANDRADE, JR.,
Attorney for Defendant.

Ordered that the foregoing be and the same is hereby settled and allowed as the bill of exceptions in the above entitled action, and the same is hereby ordered on file.

July 12, 1911.

C. M. HOUGH, *U. S. J.*

(Endorsed:) U. S. Circuit Court, Southern District, N. Y. Filed Jul- 17, 1911. John A. Shields, Clerk.

63 United States Circuit Court, Southern District of New York.

Action No. 2.

UNITED STATES OF AMERICA, Plaintiff,
vs.
ROY A. RAINEY, Defendant.

Assignment of Errors.

Roy A. Rainey, the defendant in this action, in connection with his petition for a writ of error, makes the following assignment of errors, which he avers occurred upon the trial of this action, to wit:

1.

The court erred in denying the defendant's motion to dismiss the complaint made at the close of the plaintiff's case as follows:

"Mr. ANDRADE: If the Court please, we move to dismiss on the plaintiff's evidence, on the following grounds:

1. That the complaint fails to set forth facts sufficient to constitute a cause of action.

2. That the plaintiff has failed to prove facts sufficient to constitute a cause of action.

3. That Section 37 of the Act of Congress, approved August 5, 1909, under which this action is brought, does not levy a tax, but deprives the defendant of his property without due process of law, in contravention of the fifth amendment to the Constitution of the United States.

4. That the 35 per cent duty contemplated by Section 37 of said Act, is a direct tax and void, because not apportioned in con-
64 travention of Article 1 of Section 2, and Article 1 of Section 9 of the Constitution of the United States.

5. That the $7 per ton tax contemplated by Section 37 of said Act is an excise or indirect tax, and void, for want of uniformity, in contravention of Article 1 of Section 8 of the Constitution of the United States.

6. That Section 37 of the said Act does not authorize any action in personam, against the owner or managing owner of any yacht.

7. That Section 37 of the said Act is void, as it is a bill for raising revenue, and it originated in the Senate and not in the House of Representatives, in contravention of Article 1, Section 7 of the Constitution of the United States.

The COURT: Those several motions are denied, and it will be taken under advisement.

Mr. ANDRADE: We pray an exception to the ruling of the Court."

2.

The court erred in denying the defendant's motion to dismiss the complaint made at the close of all the evidence as follows:

"Mr. ANDRADE: If the Court please, the defendant rests and the

defendant renews the motion now made on all the evidence, to dismiss the complaint on the several grounds already recited.

The COURT: That motion I will take under advisement.

Exception by defendant."

3.

The court erred in finding its first conclusion of law, as follows:

"1. Section 37 of the Tariff Act of August 5th, 1909, is valid and not in conflict with the Constitution of the United States, or any portion thereof, and the tax imposed thereby is not unreasonably arbitrary or discriminatory. It is not a direct tax but
65 an excise and is geographically uniform. It does not deprive the defendant of his property without due process of law."

4.

The court erred in finding its fourth conclusion of law, as follows:

"4. The said tax of $8,589 was duly and lawfully levied under the said Act by the Collector of Customs of the Port of New York on the 1st day of September, 1910, against the defendant on the use of the said yacht."

5.

The court erred in finding its fifth conclusion of law, as follows:

"5. The said yacht, after her purchase by the defendant on the said 25th day of June, 1908, lost her character as a British vessel, and she is not now and, since the 25th day of June, 1908, has not been a British vessel within the meaning of the Treaty with Great Britain of July 3rd, 1815, as extended by the Treaties of October 20th, 1818, and August 6th, 1827, nor has the defendant, as her owner, acquired under the said Treaty, or under Article 6, Clause 2, of the Constitution of the United States, or any other Article or Clause thereof, any right, title, privilege or immunity to be exempted or have his said yacht exempted from the operation of said Section 37 of the Tariff Act of August 5th, 1909."

6.

The court erred in finding its sixth conclusion of law, as follows:

"6. The plaintiff is entitled to judgment against the defendant for the sum of $8,589, with its costs and disbursements, but without interest, and I direct judgment accordingly."

66 7.

The court erred in entering judgment in favor of the plaintiff and against the defendant in the sum of $8,612.97.

Wherefore the plaintiff in error prays that the judgment in said Circuit Court may be reversed.

C. ANDRADE, JR.,

Attorney for Roy A. Rainey, Plaintiff in Error,
527 Fifth Avenue, Borough of Manhattan,
City of New York.

(Endorsed:) A copy of the within paper has been this day received at this office. Jul- 13, 1911. Henry A. Wise, U. S. Attorney.—U. S. Sircuit Court, Southern District N. Y. Filed Jul- 13, 1911. John A. Shields, Clerk.

67 National Surety Company.

Circuit Court of the United States of America for the Southern District of New York, in the Second Circuit.

Action No. 2.

UNITED STATES OF AMERICA, Plaintiff-Respondent,
vs.
ROY A. RAINEY, Defendant-Appellant.

Bond for Damages and Costs.

Know all men by these presents, That the National Surety Company, a corporation under the laws of the State of New York, with its principal place of business at No. 115 Broadway, in the City of New York, County and State of New York, is held and firmly bound unto the above named United States of America in the sum of Ten thousand ($10,000.00) dollars, to be paid to the said United States of America for the payment of which well and truly to be made, it binds itself, its successors and assigns, jointly and severally, firmly by these presents. Sealed with its seal, and dated the 12th day of July in the year of our Lord one thousand nine hundred and eleven.

Whereas, the above named Roy A. Rainey has prosecuted a Writ of Error to the Supreme Court of the United States to reverse the judgment rendered in the above entitled suit, by the Judge of the Circuit Court of the United States for the Southern District of New York.

Now, therefore, the condition of this obligation is such, that if the above named Roy A. Rainey shall prosecute said Writ of Error to effect, and answer all damages and costs if he fail to make said Writ of Error good, then this obligation shall be void, otherwise the same shall be and remain in full force and virtue.

NATIONAL SURETY COMPANY,
By WM. A. THOMPSON,
Res. Vice-President.

Attest:

M. W. GEWECKE,
Res. Assistant Secretary.

Sealed and delivered, and taken and acknowledged this 12th day of July, 1911, before me.

68 *Copy of By-Law.*

Be it Remembered, That at a regular meeting of the Board of Directors of the National Surety Company, duly called and held on the fourth day of February, 1908, a quorum being present, the following By-Law was adopted:

"Article XIII. Sec. 1. Signatures Required—All bonds, recognizances, or contracts of indemnity, policies of insurance, and all other writings obligatory in the nature thereof shall be signed by the President, a Vice-President, a Resident Vice-President or Attorney-in-Fact, and except when signed by an Attorney-in-Fact shall have the seal of the Company affixed thereto, duly attested by the Secretary, an Assistant Secretary or Resident Assistant Secretary. All Vice-Presidents and Resident Vice-Presidents shall each have authority to sign such instruments, whether the President be absent or incapacitated or not; and the Assistant Secretaries and Resident Assistant Secretaries shall each have authority to seal and attest such instruments, whether the Secretary be absent, or incapacitated or not. All such instruments executed as herein provided shall be as binding upon the Company as if the same were signed by the President and duly sealed and attested by the Secretary."

City and County of New York, *ss:*

I, M. W. Gewecke, Res. Assistant Secretary of the National Surety Company, have compared the foregoing By-Law with the original thereof, as recorded in the Minute Book of said Company, and do certify that the same is a correct and true transcript therefrom, and of the whole of Article XIII, Section 1 of said original By-Law.

Given under my hand and the seal of the Company, at the City of New York, this 12th day of July, 1911.

M. W. GEWECKE,
Res. Assistant Secretary.

City and County of New York, *ss:*

On this 12th day of July, 1911, before me personally appeared Wm. A. Thompson, Res. Vice-President of the National Surety Company, with whom I am personally acquainted, who, being by me duly sworn, said that he resides in the County of New York; that he is the Res. Vice-President of the National Surety Company, the corporation described in and which executed the within instrument; that he knows the corporate seal of said Company; that the seal affixed to the within instrument is such corporate seal; that it was affixed by order of the Board of Directors of said Company, and that he signed said instrument as Res. Vice-President of said Company by like authority; and that the liabilities of said Company do not exceed its assets, as ascertained in the manner provided in Section 3, Chapter 720, of New York Session laws of 1893.

And the said Wm. A. Thompson further said that he is acquainted with M. W. Gewecke and knows him to be the Res. Assistant Secretary of said Company; that the signature of the said M. W. Gewecke subscribed to the said instrument is in the genuine handwriting of the said M. W. Gewecke and was thereto subscribed by the like order of the said Board of Directors and in the presence of him, the said Res. Vice-President.

WM. F. GAYNOR,
Notary Public, etc.

[Endorsed:] Circuit Court, Southern Dist. United States of America, Plaintiff-Respondent, against Roy A. Rainey, Defendant-Appellant. Bond for Damages and Costs. Surety: National Surety Company. Action No. 2. I approve of the within bond, and of the sufficiency of the Surety. —— ——.

(Endorsed:) Approved as to form and also as to sufficiency of sureties, with reservation, however, to the Deft. in Error, of the right at any time to examine the proper officers of the Surety Company, under oath, touching its assets, liabilities and financial condition generally. Walter C. Noyes, U. S. Circuit Judge. U. S. Circuit Court, Southern District N. Y. Filed Jul- 13, 1911. John A. Shields, Clerk.

69 By the Honorable Walter C. Noyes, one of the Judges of the Circuit Court of the United States for the Southern District of New York, in the Second Circuit, to the United States of America, Greeting:

You are hereby cited and admonished to be and appear before the Supreme Court of the United States, to be holden at the City of Washington on the 12th day of August, 1911, pursuant to a writ of error filed in the Clerk's Office of the Circuit Court of the United States for the Southern District of New York, wherein Roy A. Rainey is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment in said writ of error mentioned should not be corrected and speedy justice should not be done in that behalf.

Given under my hand at the Borough of Manhattan, in the City of New York, in the District and Circuit above named, this 13th day of July, in the year of our Lord One Thousand Nine Hundred and Eleven, and of the Independence of the United States the One Hundred and Thirty-sixth.

WALTER C. NOYES,
Judge of the Circuit Court of the United States for the Southern District of New York, in the Second Circuit.

70 [Endorsed:] Law. 6/113. E. & A. D. 3268. Supreme Court of the United States. Roy A. Rainey, Plaintiff in Error, vs. United States of America, Defendant in Error. (Original.) Citation. Action No. 2. C. Andrade, Jr., Attorney for

Plaintiff in Error, 527 Fifth Avenue, Borough of Manhattan, City of New York. A copy of the within paper has been this day received at this office. Jul- 13, 1911. Henry A. Wise, U. S. Attorney. U. S. Circuit Court, Southern District N. Y. Filed Jul- 13, 1911. John A. Shields, Clerk.

[Endorsed:] United States Supreme Court. Roy A. Rainey, Pl'ff in Error, vs. The United States of America, Def't in Error. (Action No. 2.) Transcript of Record.

Endorsed on cover: File No. 22,823. S. New York C. C. U. S. Term No. 73. Roy A. Rainey, plaintiff in error, vs. The United States. Filed July 28th, 1911. File No. 22,823.

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1913.

No. 74.

ROY A. RAINEY, PLAINTIFF IN ERROR,

vs.

THE UNITED STATES.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

FILED JULY 28, 1913.

(22,824)

(22,824)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1913.

No. 74.

ROY A. RAINEY, PLAINTIFF IN ERROR,

vs.

THE UNITED STATES.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

INDEX.

	Original.	Print
Writ of error	1	1
Clerk's certificate	2	1
Summons	3	2
Amended complaint	4	3
Answer	7	4
Demurrer	18	10
Opinion, Noyes, C. J.	20	11
Order sustaining demurrer	42	22
Memorandum concerning interest	44	23
Order denying application for interest	45	24
Judgment	47	24
Assignment of errors	49	25
Bond	53	27
Citation	55	29

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JULY 8, 1913.

1 *Writ of Error.*

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Judges of the Circuit Court of the United States for the Southern District of New York, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Circuit Court, before you, or some of you, between The United States of America, plaintiff below and defendant in error, and Roy A. Rainey, defendant below and plaintiff in error, a manifest error hath happened, to the great damage of the said plaintiff in error as is said and appears by his complaint: We, being willing that such error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, Do Command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Justices of the Supreme Court of the United States, at the Capitol in the City of Washington, together with this writ, so that you have the same at the said place, before the Justices aforesaid, on the 12th day of August next, that the record and proceedings aforesaid being inspected, the said Justices of the Supreme Court may cause further to be done therein, to correct that error, what of right and according to the law and custom of the United States ought to be done.

Witness, the Honorable Edward D. White, Chief Justice of the Supreme Court of the United States, this 13 day of July in the year of our Lord one thousand eight hundred and eleven and of the Independence of the United States the one hundred and thirty-sixth.

[L. S.] JOHN A. SHIELDS,
Clerk of the Circuit Court of the United States of America, for the Southern District of New York, in the Second Circuit.

The foregoing writ is hereby allowed.
WALTER C. NOYES,
U. S. Circuit Judge.

2 *Clerk's Certificate.*

UNITED STATES OF AMERICA,
Southern District of New York, ss:

I, John A. Shields, Clerk of the Circuit Court of the United States of America, for the Southern District of New York, in the Second Circuit, by virtue of the foregoing Writ of Error, and in obedience thereto, do hereby certify, that the following pages, numbered from

three to fifty-six inclusive, contain a true and complete transcript of the record and proceedings had in said Court in the cause of Roy A. Rainey, Plaintiff in error, against The United States of America, Defendant in error, as the same remain of record and on file in said office.

In Testimony whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, in the Second Circuit, this 26th day of July, in the year of our Lord, one thousand nine hundred and eleven, and of the Independence of the United States the one hundred and Thirty-sixth.

[Seal of the Circuit Court, South. Dist. New York.]

JOHN A. SHIELDS, *Clerk.*

[Endorsed:] Law 4/224. Supreme Court of the United States. Roy A. Rainey, Plaintiff in Error, vs. The United States of America, Defendant in Error. Writ of Error. Action #1. E. & A. D. 3269. C. Andrade, Jr., Attorney for Plaintiff in Error. Due service of a copy of the within Writ of Error is hereby admitted this — day of ——, 188–. —— ——, Attorney for Defendant in Error. U. S. Circuit Court, Southern District, N. Y. Filed Jul- 13, 1911. John A. Shields, Clerk. A copy of the within paper has been this day received at this office, Jul- 13, 1911. Henry A. Wise, U. S. Attorney.

3 *Summons.*

United States Circuit Court, Southern District of New York.

THE UNITED STATES OF AMERICA, Plaintiff,
against
ROY A. RAINEY, Defendant.

To the above-named defendant:

You are hereby summoned to answer the complaint in this action and to serve a copy of your answer on the plaintiff's attorney within twenty days after the service of this summons, exclusive of the day of service; and in case of your failure to appear, or answer, judgment will be taken against you by default for the relief demanded in the complaint.

Witness, the Honorable Melville W. Fuller, Chief Justice of the United States, at the Borough of Manhattan in the City of New York, this 16 day of December, in the year one thousand nine hundred and nine.

[L. S.] JOHN A. SHIELDS, *Clerk.*

HENRY A. WISE,
U. S. Attorney, Plaintiff's Attorney.

Office and Post-office address, Room 50, U. S. Court and P. O. Building, Borough of Manhattan, New York City.

4 United States Circuit Court, Southern District of New York.

UNITED STATES OF AMERICA
vs.
ROY A. RAINEY.

Amended Complaint.

The plaintiff above named, by Henry A. Wise, United States Attorney for the Southern District of New York, its attorney, for its amended complaint against the defendant above named, alleges, on information and belief, as follows:—

First. That the plaintiff is a corporation Sovereign.

Second. That the defendant is a citizen of the United States.

Third. That on the 1st day of September, 1909, the defendant was the managing owner of the yacht "Cassandra"; that the said yacht was, and is, a foreign built vessel, and that it was built in the Kingdom of Great Britain; that the said yacht had a gross tonnage of 1,227.17 tons; that the said yacht had not been, and was not, used or intended to be used for trade.

Fourth. That on or about the 1st day of September, 1909, the Collector of Customs at the Port of New York, that being the District nearest the residence of the defendant, fixed and determined the sum of Eight thousand five hundred and eighty-nine dollars ($8,589.00), as the sum equivalent to the tonnage tax of seven dollars ($7.00)
5 per gross ton upon the use of the said yacht, and thereby levied a tonnage tax in said amount upon the use of the same.

Fifth. That the said Collector of Customs at the Port of New York gave notice to the defendant of the levy of the said tax, and demanded payment thereof on the 1st day of September, 1909, prior to the beginning of this action, but no part thereof has been paid, and the defendant has not paid a duty of thirty-five per cent. (35%) ad valorem upon the said yacht, in lieu of the said tax.

Wherefore, plaintiff demands judgment against the defendant for the sum of Eight thousand five hundred and eighty-nine dollars ($8,589.00), with interest thereon from the first day of September, 1909, together with the costs and disbursements of this action.

HENRY A. WISE,
United States Attorney for the Southern District of New York, Attorney for the Plaintiff.

Office and Post-office Address: Room 50, United States Court House and Post-office Building, Borough of Manhattan, City of New York, N. Y.

6 STATE OF NEW YORK,
County of New York, Southern District of New York, ss:

Addison S. Pratt, being duly sworn, deposes and says:

That he is an Assistant to the United States Attorney for the Southern District of New York, plaintiff's attorney; that he has

read the foregoing complaint and knows the contents thereof; that the same is true of his own knowledge, except as to the matters therein stated to be alleged upon information and belief, and as to those matters he believes it to be true;

That the reason why this verification is made by deponent and not by plaintiff is, that the latter is a corporation Sovereign;

That the sources of deponent's information and the grounds of his belief are communications received from the Collector of Customs of the Port of New York and the Commissioner of Navigation of the Department of Commerce and Labor.

ADDISON S. PRATT.

Sworn to before me this 16th day of June, 1910.
[SEAL.] FREDERICK L. CAMPBELL,
Notary Public, Kings Co.

Cert. filed in N. Y. Co.

(Endorsed:) Due service of a copy of the within is hereby admitted. New York, June 16th, 1910. C. Andrade, Jr., Attorney for Def't.—U. S. Circuit Court, Southern District N. Y., Filed Jun- 17. 1910, John A. Shields, Clerk.

7 United States Circuit Court, Southern District of New York.

UNITED STATES OF AMERICA
vs.
ROY A. RAINEY.

Answer to Amended Complaint.

The defendant by Cipriano Andrade, Jr., his attorney, answering the amended complaint, alleges:

For a First Separate Defence to the Whole of the Plaintiff's Claim.

First. That it was the intention of Congress in and by said act of August 5, 1909, and it appears upon the face thereof, that the sum thereby directed to be levied and collected upon the use of every foreign-built yacht, pleasure-boat or vessel owned or chartered for more than six months by any citizen or citizens of the United States, should be an annual tax, that it should be prospective in its operation, and operate only upon the future use of any such foreign-built yacht, pleasure-boat or vessel and that said annual tax will not accrue and cannot be duly levied and collected prior to the first day of September in the year 1910.

For a Second Separate Defence to the Whole of the Plaintiff's Claim.

8 Second. That said yacht has at no time been, and is not now, registered, enrolled or documented as a vessel of the United States, and is not entitled to enjoy or exercise, and

has never enjoyed or exercised, any rights, privileges or protection as a vessel of the United States.

Third. On information and belief that at the time of the passing and approval of said act of Congress as aforesaid and of the alleged levy of said annual tax upon the use of this defendant's said yacht, there were and ever since have been in the United States, and within its jurisdiction, a large number of yachts, pleasure-boats and vessels not used or intended to be used for trade, and not foreign-built, which were then owned or chartered for more than six months by citizens of the United States, and which were and are similar to this defendant's said yacht in all substantial respects as to construction, character and nature of property, and identical with this defendant's said yacht in all respects as to use and as being personal property of citizens of the United States, but upon which property so similarly situated no tax is imposed by the said act of Congress.

Fourth. That said act of Congress, in so far as it purports in and by section 37 thereof to direct the levy and collection of a tax upon this defendant's said yacht, is not a general law operating upon all citizens of the United States owning and using like property under substantially similar conditions and circumstances, and that the levy and collection from this defendant of said sum, equivalent to a tonnage tax of seven dollars per gross ton, would not constitute a levy and collection of any tax, duty, impost or excise within the true meaning of the Constitution of the United States, but would deprive this defendant of his property without due process of law,
9 in conflict with the Fifth Article of Amendment to the Constitution of the United States.

For a Third Separate Defence to the Whole of the Plaintiff's Claim

Fifth. On information and belief that at the time of the passing and approval of said act of Congress as aforesaid and of the alleged levy of said annual tax upon the use of this defendant's said yacht, there were and ever since have been in several of the States of the United States, and within its jurisdiction, a large number of foreign-built yachts, pleasure-boats and vessels not used or intended to be used for trade, which were then owned or chartered for more than six months by citizens of the United States, and which were and are similar to this defendant's said yacht in all substantial respects as to construction, character and nature of property, and identical with this defendant's said yacht in all respects as to use and as being personal property of citizens of the United States, and that neither the tonnage nor the value of said yachts was then or now is apportioned among the several States of the United States, either according to the several numbers of said States or according to the census or enumeration of said States.

Sixth. That by virtue of the premises, the said section 37 of the act of Congress, approved August 5, 1909, under which this action is brought, is null, void, and of none effect, in that said act of Congress in imposing a duty of thirty-five percentum ad valorem on foreign built yachts, lays a direct tax, which direct tax is not ap-

portioned among the several States according to their respective numbers as required by Article 1 Section 2 Clause 3 of the Constitution of the United States; and which direct tax is not
10 laid in proportion to the census or enumeration, as required by Article 1, section 9, clause 4 of the Constitution of the United States.

For a Fourth Separate Defence to the Whole of the Plaintiff's Claim.

Seventh. On information and belief that at the time of the passing and approval of said act of Congress as aforesaid and of the alleged levy of said annual tax upon the use of this defendant's said yacht, there were and ever since have been in several of the States of the United States, and within its jurisdiction, a large number of foreign-built yachts, pleasure-boats and vessels not used or intended to be used for trade, which were then owned or chartered for more than six months by citizens of the United States, and which were and are similar to this defendant's said yacht in all substantial respects as to construction, character and nature of property, and identical with this defendant's said yacht in all respects as to use and as being personal property of citizens of the United States; and that some of said yachts in one State are or may be substantially equal in tonnage but not substantially equal in value to some of said yachts in other States, and that some of said yachts in one State are or may be substantially equal in value but not substantially equal in tonnage to some of said yachts in other States; and that some of said yachts in one State are or may be substantially equal in tonnage and value to some of said yachts in other States. That there is no necessary relation between the value and the tonnage of a yacht.

Eighth. That by virtue of the premises, the said section 37 of the act of Congress, approved August 5, 1909, under which this
11 action is brought, is null, void and of none effect, in that said act of Congress in laying upon the use of foreign-built yachts an annual sum or charge equivalent to a tonnage tax of seven dollars per gross ton is laying an indirect tax or excise, which excise is not uniform throughout the United States, as required by Article 1, Section 8, Clause 1 of the Constitution of the United States; the fact being that under said act of Congress, two or more such yachts of substantially equal tonnage but substantially unequal value may be unequally taxed on such equal tonnage in two different States; and two or more such yachts of substantially equal value but substantially unequal tonnage may be unequally taxed on such equal value in two different States; and one or more such yachts may be taxed in one State of the United States in a certain sum at the rate of seven dollars per gross ton, irrespective of the value thereof, and another such yacht or yachts in another State of the United States and substantially similar in value and tonnage to the said first mentioned yacht, may be taxed in a substantially different sum at the rate of thirty-five per cent of the value thereof, irrespective of the tonnage thereof; whereby inequality and nonuniformity of the taxation of such yachts in different parts of the United States will result.

For a Fifth Separate Defence to the Whole of the Plaintiff's Claim.

Ninth. That prior to the fifth day of August, 1909, defendant purchased said yacht for a valuable consideration, and continuously since said purchase has been and now is the owner and the managing owner of said yacht.

12 Tenth. That prior to August 5, 1909, the defendant was in full possession and enjoyment of the right, title, privilege and immunity of using said yacht, free and clear of any tax or duty or charge equivalent to a tonnage tax of seven dollars per gross ton per annum or of any duty of 35 percent ad valorem, and that said right, title, privilege and immunity was and is property within the scope and meaning of the fifth amendment to the Constitution of the United States.

Eleventh. That in order to make the tax herein due and payable on September 1, 1909, it is necessary to impose on the defendant's use of said yacht for said period prior to August 5, 1909, duties and charges at the rate of seven dollars per gross ton per annum.

Twelfth. That the said act of Congress, on August 5, 1909, in taxing and penalizing defendant's use of said yacht, for said period prior to August 5, 1909, annulled, destroyed and took away the defendant's right, title, privilege and immunity hereinbefore mentioned.

Thirteenth. That the said annulment, destruction and taking away, on August 5, 1909, of defendant's said right, title, privilege and immunity, which he had previously possessed and enjoyed prior to August 5, 1909, was a deprivation of defendant's property without due process of law, within the scope and meaning of the Fifth Amendment to the Constitution of the United States.

For a Sixth Separate Defence to the Whole of the Plaintiff's Claim.

Fourteenth. On information and belief that the defendant's said yacht, mentioned in the complaint herein, was built in

13 the Kingdom of Great Britain prior to the fifth day of August, 1909, and that after said yacht had been so built, and prior to the fifth day of August, 1909, defendant purchased said yacht for a valuable consideration, and that continuously since said purchase defendant has been and now is the owner and the managing owner of said yacht.

Fifteenth. Defendant repeats the allegations of paragraph Second hereof.

Sixteenth. On information and belief that said yacht at all the times herein mentioned was and now is a British vessel, within the scope and meaning of the hereinafter mentioned treaties.

Seventeenth. That in and by a certain treaty or convention between the plaintiff and His Brittanick Majesty, concluded on the third day of July, 1815, and duly ratified December 22, 1815, as extended by a certain treaty or convention between the plaintiff and His Majesty the King of the United Kingdom of Great Britain and Ireland, concluded on the 20th day of October, 1818, and duly ratified January 30, 1819, as extended by a certain treaty or con-

vention between the plaintiff and His Majesty the King of the United Kingdom of Great Britain and Ireland, concluded on the 6th day of August, 1827, and duly ratified April 2, 1828, it was provided that no higher or other duties or charges shall be imposed in any of the Ports of the United States on British vessels, than those payable in the same ports by vessels of the United States, and that it should be competent to either of the contracting parties, in case either should think fit, at any time after the twentieth day of October, 1828—on giving due notice of twelve months to the other contracting party to annul and abrogate said convention:—

14 and that it should, in such case, be accordingly entirely annulled and abrogated, after the expiration of the said term of notice.

Eighteenth. On information and belief, that at no time has the United States of America given due notice of twelve months, or any notice whatever, to the government of Great Britain or to the King or Queen thereof of an intention to annul or abrogate said convention.

Nineteenth. That at no time since said 3rd day of July, 1815, has any vessel of the United States, or any yacht of the United States, in any port of the United States had imposed upon it a duty or charge or sum equivalent to a tonnage tax of seven dollars per gross ton per annum, or a duty of thirty-five per cent ad valorem, or any other charge or duty equal to or as high as the duty or charge mentioned in the complaint herein.

Twentieth. That by virtue of the premises; as well as by virtue of article 6 clause 2 of the Constitution of the United States, the defendant at and prior to the 5th day of August, 1909, was in the full possession and enjoyment of the right, title, privilege and immunity, under said treaties, to have no higher or other duties or charges imposed in any of the ports of the United States on his said yacht, than those payable in the same ports by vessels of the United States; that said right, title, privilege and immunity was and is property within the scope and meaning of the fifth amendment to the Constitution of the United States; and that in order to make the tax herein due and payable on September 1, 1909, it is necessary to impose on said yacht for said period to August 5, 1909, duties and charges higher and other than the duties and charges then payable in the ports of the United States by vessels of the United States, which would be a deprivation of defendant's property without due process of law, in contravention of the Fifth Amendment to the Constitution of the United States.

15 For a Seventh Separate Defence to the Whole of the Plaintiff's Claim.

Twenty-first. Defendant repeats the allegations of paragraphs Fourteenth, Fifteenth, Sixteenth, Seventeenth, Eighteenth and Nineteenth of this answer.

Twenty-second. On information and belief that it was not the intention of Congress in and by said act approved August 5, 1909,

nor does any intention appear upon the face of said act of Congress, to abrogate or annul said treaties hereinbefore mentioned.

Twenty-third. That by virute of the premises; as well as by virtue of article 6 clause 2 of the Constitution of the United States, the defendant at all times, and continuously to the present time, was and now is in the full possession and enjoyment of the right, title, privilege and immunity under said treaties to be exempted and to have his said yacht exempted from the operation of said act approved August 5, 1909.

For an Eighth Separate Defence to the Whole of the Plaintiff's Claim.

Twenty-fourth. That the said act approved August 5, 1909, as is apparent upon the face thereof, does not authorize any action in personam against the owner or managing owner of any yacht mentioned in said act.

For a Ninth Separate Defence to the Whole of the Plaintiff's Claim.

Twenty-fifth. That the said section 37 of the act of Congress approved August 5, 1909, is a bill for raising revenue.

16 Twenty-sixth. That said section 37 of said act of Congress did not originate in the House of Representatives.

Twenty-seventh. That said section 37 of said act of Congress was not an "amendment" to H. R. bill 1438, as originated in the House of Representatives, within the purview of article 1 section 7 of the Constitution of the United States.

Wherefore defendant prays the judgment of this court touching the several matters, rights, titles, privileges and immunities above set forth; and touching the construction and application of the Constitution of the United States in the several particulars above set forth; and touching the constitutionality or unconstitutionality and construction of said law of the United States approved August 5, 1909; and touching the validity and construction of said three several treaties.

And the defendant demands the judgment of this court dismissing the complaint herein, with the costs and disbursements hereof.

CIPRIANO ANDRADE, JR.,
Attorney for Defendant.

527 Fifth Avenue, Borough of Manhattan, City of New York.

17 SOUTHERN DISTRICT OF NEW YORK,
County of New York, ss:

Cipriano Andrade, Jr., being duly sworn, says that he is the attorney for the defendant. That he has read the foregoing answer to the amended complaint and knows the contents thereof, and that the same is true of his own knowledge except as to the matters therein stated to be alleged on information and belief, and as to those matters, he believes it to be true. That the reason this verification is not made by the defendant, is because the defendant is

absent from this jurisdiction, and the sources of deponent's information and the grounds of his belief are correspondence which deponent has had with the defendant touching the subject matter of this action, and examinations of the laws and treaties of the United States heretofore made by deponent.

CIPRIANO ANDRADE, JR.

Sworn to before me this 18 day of June, 1910.
[SEAL.] SCOTT STEWART,
Notary Public, Westchester County.

Certificate filed in New York County.

(Endorsed:) Copy Received. Henry A. Wise, Att'y for Pl'tff. N. Y. June 20/10.—U. S. Circuit Court, Southern District N. Y., Filed Jun. 20, 1910, John A. Shields, Clerk.

18 *Demurrer.*

United States Circuit Court, Southern District of New York.

At Law.

UNITED STATES OF AMERICA, Plaintiff,
vs.
ROY A. RAINEY, Defendant.

The plaintiff above named by Henry A. Wise, United States Attorney for the Southern District of New York, its attorney, hereby demurs to the answer of the defendant to the amended complaint herein and to each and every defense in the said answer contained on the ground that each and every said defense is insufficient in law on the face thereof and does not state facts sufficient to constitute a defense to the cause of action in the plaintiff's amended complaint.

HENRY A. WISE,
United States Attorney for the Southern District of New York, Attorney for Plaintiff.

Office and Post-office Address, Room 50, U. S. Court-house & P. O. Bldg., Borough of Manhattan, City of New York.

STATE OF NEW YORK,
County of New York, Southern District of New York, ss:

Addison S. Pratt, being duly sworn, deposes and says: I am an assistant to the United States Attorney for the Southern District of New York. The foregoing demurrer is not interposed for delay and, in my opinion, the same is well founded in point of law.

ADDISON S. PRATT.

Sworn to before me this 20th day of June, 1910.
[SEAL.] FREDERICK L. CAMPBELL,
Notary Public, Kings Co.

Cert. filed in N. Y. Co.

19 (Endorsed:) Due service of a copy of the within is hereby admitted. New York, June 21st, 1910. C. Andrade, Jr., Attorney for Deft.—U. S. Circuit Court, Southern District N. Y., Filed Jun- 21, 1910. John A. Shields, Clerk.

20 *Opinion.*

United States Circuit Court, Southern District of New York.

UNITED STATES OF AMERICA
vs.
CORNELIUS K. G. BILLINGS.

UNITED STATES OF AMERICA
vs.
JAMES GORDON BENNETT.

UNITED STATES OF AMERICA
vs.
HARRIETT GOELET.

UNITED STATES OF AMERICA
vs.
H. CLAY PIERCE.

UNITED STATES OF AMERICA
vs.
ROY A. RAINEY.

On Demurrers to Answers.

NOYES, *Circuit Judge:*

These actions are brought by the United States to recover the annual tonnage tax upon the use of foreign built yachts under section 37 of the Tariff Act of 1909 which is printed in full in
21 the foot note.*

* "There shall be levied and collected annually on the first day of September by the collector of customs of the district nearest the residence of the managing owner, upon the use of every foreign-built yacht, pleasure-boat or vessel, not used or intended to be used for trade, now or hereafter, owned or chartered for more than six months by any citizen or citizens of the United States, a sum equivalent to a ton-age tax of seven dollars per gross ton.

"In lieu of the annual tax above prescribed the owner of any foreign-built yacht, pleasure-boat or vessel above described may pay a duty of thirty-five per centum ad valorem thereon, and such yacht, pleasure-boat or vessel shall thereupon be entitled to all the privileges and shall be subject to all the requirements prescribed by sections forty-two hundred and fourteen, forty-two hundred and fifteen, forty-two hundred and seventeen, and forty-two hundred and eighteen of the Revised Statutes and Acts amendatory thereto in the same manner as if said yacht had been built in the United States, and shall be subject to ton-age duty and light- money only in the same manner as if said yacht had been built in the United States.

"So much of section five of chapter two hundred and twelve of the laws of nineteen hundred and eight, approved May twenty-eighth, nineteen hundred and eight, as relates to yachts built outside the United States and owned by citizens of the United States is hereby repealed.

"This section shall not apply to a foreign-built vessel admitted to American registry."

The complaint in each action alleges in substance that the defendant therein was, on September 1st, 1909, a citizen of the United States and the managing owner of a foreign built yacht and that the tax in question was duly levied and has never been paid.

The defendants have severally answered, setting up separate defenses and each presenting defenses of a different nature. These defenses go both to the constitutionality of the statute and its application upon different states of facts, so that upon the several demurrers of the Government the questions of constitutionality and interpretation are clearly presented and are presented in different phases. The important questions so raised may properly be considered in this order:

(1) Is the statute so discriminatory in its provisions as to violate the Fifth Amendment to the Constitution of the United
22 States?*

(2) Does the statute conflict with the Fifth Amendment by levying taxes on property situated outside the territorial jurisdiction of the United States?
23

(3) Was the annual tax properly leviable on September 1, 1909?

(4) How far is it necessary to show actual use of the yachts during the year prior to September 1, 1909?

(5) Can the owner of a foreign built yacht acquire immunity under an earlier treaty which will exempt him from the operation of the statute?

With respect to the first question: It is pointed out by the defendants that the test of the application of the statute is (1) the place of origin of the yacht and (2) the citizenship of the owner or charterer and it is contended that the "due process of law" clause of the Fifth Amendment requires Congress, if it desire to tax yachts, to make an enactment of an essentially different nature applicable to all yachts of similar character and whether owned by citizens or

* Questions under other constitutional provisions are considered in the briefs. Thus the brief of the Government contains an elaborate consideration of the question whether the annual tonnage tax is an excise or a direct tax within the meaning of the Constitution. The briefs of the defendants, however, apparently concede that the tax is an excise and would be valid if it were not discriminatory and did not affect property outside the jurisdiction in violation of the Fifth Amendment. Consideration of the question whether the tax is a direct tax is, therefore, unnecessary in this opinion, although by omitting to discuss it I would not seem to indicate that I have any doubt that the Government's contention in the matter is correct.

One of the defendants raises another constitutional question by contending that the thirty-five per cent ad valorem duty which the owners of foreign-built yachts have the privilege of paying in lieu of the annual tonnage tax, is a direct tax and is invalid because not apportioned among the States. This contention is at least doubtful. The owner is not required to pay this duty. He is merely given the option of paying it. In its nature it would seem to be a duty on imports and such duties are not held to be direct taxes requiring apportionment. But it is unnecessary to pass upon this question. These actions are for the recovery of the annual tonnage tax and the validity of the ad-valorem tax is not involved. The provisions concerning that tax are separable from those concerning the annual tax. The one is not dependent upon the other and there is no indication that Congress would not have adopted the one without the other. Under such conditions it is well settled that unconstitutional provisions may be separated from legal provisions and effect be given to the latter.

resident aliens. It is urged, in support of this contention, that there is no real difference between the use of a foreign built yacht and the use of a similar vessel built in the United States; nor between the use of such a vessel by a citizen and by a resident alien, and that the classifications made by the statute are arbitrary, discriminatory and without any reasonable basis.

On the other hand it is stated by the Government that the object which Congress sought to accomplish was the protection of American ship-builders and the promotion of American ship-building by forcing American citizens to buy yachts built in this country. And as it is not obvious how taxing the use of foreign built yachts already purchased would promote American industries, it is
24 said that Congress made the statute applicable to past purchases in order that the owners of all foreign-built yachts should be taxed equally.

If the validity of this legislation depended upon satisfying this Court of its wisdom, fairness and justness, other reasons and facts than those thought necessary to be included in the Government's brief would be required. But as the Supreme Court has said (District of Columbia vs. Brooke, 214 U. S. 138) "the Courts cannot be made a refuge from ill advised, unjust or oppressive laws." The only inquiry to be considered here is whether this statute deprived these defendants of their property without due process of law.

"Due process of law"—guaranteed in both the Fifth and Fourteenth Amendments to the Constitution—means the law of the land. The guaranty implies the administration of equal laws according to established rules by competent tribunals having jurisdiction and proceeding upon notice and hearing. It affects the operations of the different departments of the government. It prevents arbitrary executive action. It applies to judicial proceedings and requires orderly procedure. It operates against confiscatory legislative enactments. It safeguards the rights of the citizen even in the exercise of the paramount rights of the state.

The power of taxation is a paramount right incident to the sovereignty of every state and is exercised by the legislative department of the government. It rests upon the theory that the public welfare requires the sacrifice of private rights and that the
25 value of taxes exacted from the citizen is returned to him in the benefits conferred by the government. The power to tax is broad. Chief Justice Marshall said in McCulloch vs. Maryland, 4 Wheat. 316:

"The people of a State, therefore, give to their government a right of taxing themselves and their property, and as the exigencies of government cannot be limited they prescribe no limits to the exercise of this right, resting confidently on the interest of the legislator and on the influence of the constituent over their representatives to guard them against its abuse."

But broad as is the taxing power of the federal government, there are constitutional limitations attached to its exercise. The special restraints imposed by the Constitution are that no capitation or direct tax shall be laid without apportionment; that no tax or duty shall be

laid upon any article exported from a State, and that "all duties, imposts and excises shall be uniform throughout the United States." (Const. Art. 1, sec. 8 par. 1; sec. 9, pars. 4 and 5). There are also undoubtedly general limitations imposed by the due process of law clause of the Fifth Amendment. Due process of law requires at least the exercise of the taxing power only for public purposes and regularity in the processes for the assessment and collection of taxes.*

26 These defendants, however, as I have already indicated, contend for a far broader application of the due process clause than that just pointed out, and, in effect, urge that this Court should declare the statute in question unconstitutional because the selection for taxation of the use of foreign-built yachts is arbitrary and discriminatory. They say that that which is essential to due process of law in taxation, whether by the nation or the state, is "that a tax law must apply impartially to all persons in the same class, that is, similarly situated, and that it must operate equally and uniformly upon all persons in like circumstances and under like conditions.

If the Fifth Amendment were as broad as the Fourteenth, there would be more ground for these contentions of the defendants. But the Fourteenth Amendment differs from the Fifth Amendment in that in addition to the "due process of law" clause, it contains the provision that no State shall "deny to any person within its jurisdiction the equal protection of the laws." This provision is directly aimed at discriminatory legislation. Its object is to secure equality and generality in State statutes. Under this clause many decisions, both federal and state, have been rendered holding different state enactments unconstitutional as lacking the character of generality and as containing discriminatory classifications. The Supreme Court of the United States, however, has never held that the equality clause adds nothing to the scope of the Fourteenth Amendment so that decisions under it have controlling force in determining the application of the Fifth. It is true that it seems to be assumed by text writers and that there are dicta in the

27 decisions to the effect that discriminatory legislation is as much in conflict with the due process clause as with the equality clause. But however this may be with respect to the exercise of other powers, I am satisfied that in the exercise of the taxing power, so long as Congress follows the particular constitutional provisions relating to the levying of taxes, there are no limitations upon its right to discriminate in selecting the subjects of taxation.

In McCray vs. United States, 195 U. S. 27, in sustaining the validity of the Oleomargarine Act, the Supreme Court, through the presnt Chief Justice, said (pp. 59, 61, 63):

"Since, as pointed out in all the decisions referred to, the taxing power conferred by the Constitution knows no limits except those expressly stated in that instrument, it must follow, if a tax be

* There will be occasion later to consider how far the principle that the due process clause in the Fourteenth Amendment prevents a State from taxing property located outside its territorial jurisdiction applies in the consideration of Acts of Congress in relation to the Fifth Amendment.

within the lawful power, the exertion of that power may not be judicially restrained because of the results to arise from its exercise." * * *

"Whilst undoubtedly both the Fifth and Tenth Amendments qualify, in so far as they are applicable, all the provisions of the Constitution, nothing in those amendments operates to take away the grant of power to tax conferred by the Constitution upon Congress. The contention on this subject rests upon the theory that the purpose and motive of Congress in exercising its undoubted powers may be inquired into by the courts, and the proposition is therefore disposed of by what has been said on that subject." * * *

"Conceding merely for the sake of argument that the due process clauses of the Fifth Amendment would avoid an exertion of the taxing power which, without any basis for classification, arbitrarily taxed one article and excluded an article of the same class, such concession would be wholly inapposite to the case in hand. The distinction between natural butter artificially colored, and oleomargarine artificially colored so as to cause it to look like butter, has been pointed out in previous adjudications of this court. * * * That provision (the Fifth Amendment), as we have previously said, does not withdraw or expressly limit the grant of power to tax conferred upon Congress by the Constitution. From this it follows as we have also previously declared, that the judiciary is without au-
28 thority to avoid an act of Congress exerting the taxing power, even in a case where to the judicial mind it seems that Congress had in putting such power in motion abused its lawful authority by levying a tax which was unwise or oppressive, or the result of the enforcement of which might be to indirectly affect subjects not within the powers delegated to Congress."

And in the very recent case of District of Columbia vs. Brooke, 214 U. S. 138, 149, Mr. Justice McKenna, said:

"The other objections expressed the same fundamental idea, to wit, that the act discriminates between resident and non-resident owners of property, and because it does it is void. * * *

"The defendant in error asserts this discrimination and argues its consequences at some length, but does not refer to any provision of the Constitution of the United States which prohibits Congress from enacting laws which discriminate in their operation between persons or things. If there is no express prohibition of such power, may prohibition be implied from our form of government? Upon that proposition we need not express an opinion. If prohibition exists, it must rest on all the powers conferred by the Constitution. This Court, however, has just held, in the case of United States vs. Delaware & Hudson Co., 213 U. S. 366, that Congress may, in the exercise of the powers to regulate commerce among the States, discriminate between communities and between carriers engaged in such commerce. And it was said that the assertion that 'injustice and favoritism' might 'be operated thereby,' could 'have no weight in passing upon the question of power.' In the case at bar we are dealing with an exercise of the police power, one of the most essen-

tial of powers, at times the most insistent, and always one of the least limitable of the powers of government."*

29 It is clear that Congress, in enacting the statute in question, acted within all the limitations of the Constitution regulating the exercise of the taxing power. As we have seen, the tax is an excise and not a direct tax. It also possesses the uniformity required by the constitutional provision. It is assessed equally on all citizens throughout the United States who own or charter foreign built yachts. It is geographically uniform and that which the Constitution prescribes is geographical and not intrinsic uniformity. This principle has been consistently adhered to in a series of decisions: Patton vs. Brady, Ex.: 184 U. S. 608; Knowlton vs. Moore, 178 U. S. 41; Pollock vs. Farmers Loan and Trust Co., 157 U. S. 429; Head Money Cases, 112 U. S. 580; United States vs. Singer, 15 Wall. 111.

The statute, then, being in accord with all the special constitutional limitations, I should be unable to hold it in violation of the Fifth Amendment even if I were of the opinion that there exists no fair and reasonable basis for the discrimination which it makes between the owners of foreign and home built yachts, and even if I were of the opinion that a similar discrimination would bring a state statute into conflict with the Fourteenth Amendment. It is my opinion that Congress had the right to select a certain class of property, to wit, foreign-built yachts, and to tax the use thereof by all citizens owning or chartering the same, and that such a tax law cannot be set aside by the courts because it is held to be unreasonably discriminatory. But it is unnecessary to go so far in order to decide this case. Whatever may be said of the justness of the

30 statute, it cannot be said that the discrimination which it makes against citizens owning foreign-built yachts, is without any substantial basis. Taxing the use of foreign-built yachts may tend, in some degree, to protect and promote American ship building. Citizens stand in a position different from aliens, whether resident or non-resident. Regarding the statute from any point of view I cannot say that it is unconstitutional class legislation.

The next inquiry is whether the statute conflicts with the due process of law clause by levying taxes on property outside the jurisdiction of the United States.

The answers of the defendants Goelet and Bennett allege that their yachts were not within the jurisdiction of the United States for several years prior to the passage of the statute and that each had required a permanent situs in a foreign country. The answer of the defendant Goelet further alleges that she was and is domiciled in France and is a resident of that country.

The first question raised by the demurrers to these answers is a constitutional one; the second, one of interpretation. Assuming

* The Court further said in this opinion that while it was not necessary to decide whether Congress had, broadly considered, the power to discriminate, no stricter limitation upon its power was possible, in any event, than that imposed upon the States by the Fourteenth Amendment.

that the statute applies to the yachts of these defendants, is it constitutional? Should it be so construed as to apply to them?

The constitutional question presented is, as already stated, another phase of that just considered, viz: the relation of the due process clause to this statute. If it be unconstitutional as taxing property outside the jurisdiction of the United States, it is so because the levy of a tax upon such property denies due process of law to the
31 owner thereof.

As we have seen, the theory upon which taxes are levied is that the tax payer receives back in benefits from the government the value of the taxes exacted from him. Theoretically, the benefit received should be in exact proportion to the obligation imposed. As a corollary to these propositions it is held that the power of the State to impose taxes is limited to property within the territorial jurisdiction, because only with respect to such property is the state in a position to afford the protection and benefit due as a consideration for the tax imposed. These principles are clearly stated in the opinion of Mr. Justice Brown in Union Transit Co., vs. Kentucky, 199 U. S. 194, 202, 204:

"The power of taxation, indispensable to the existence of every civilized government, is exercised upon the assumption of an equivalent rendered to the taxpayer in the protection of his person and property, in adding to the value of such property, or in the creation and maintenance of public conveniences in which he shares, such, for instance, as roads, bridges, sidewalks, pavements, and schools for the education of his children. If the taxing power be in no position to render such services, or otherwise to benefit the person or property taxed, and such property be wholly within the taxing power of another State, to which it may be said to owe an allegiance and to which it looks for protection, the taxation of such property within the domicil of the owner partakes rather of the nature of an extortion than a tax, and has been repeatedly held by this court to be beyond the power of the legislature and a taking of property without due process of law. * * *

"It is also essential to the validity of a tax that the property shall be within the territorial jurisdiction of the taxing power. Not only is the operation of state laws limited to persons and property within the boundaries of the State, but property which is wholly and exclusively within the jurisdiction of another State, receives none of the protection for which the tax is supposed to be the compensation."

32 In the application of these principles distinctions are necessarily drawn according to the different kinds of property. Real estate is taxed at its actual situs irrespective of the owner's domicil. The maxim mobilia sequuntur personam may determine the situs of intangible personal property for purposes of taxation. But in respect of tangible personal property the law of the owner's domicil has yielded to the law of the place where the property is kept and used. So far, at least, as the States are concerned, tangible personal property may be regarded as separated from its owner and may be taxed where located although that may not be the place of the

owner's residence or domicil. And the converse of the proposition is equally true, that such property outside the boundaries of the state may not be subjected to taxation there.*

33 Upon these principles it is clear that foreign-built yachts having a permanent situs in a state other than that of their owner's domicile are with respect to state legislation subject to the lex situs rule. Such vessels are not entitled to be registered or enrolled and can only become "vessels of the United States" by special acts of Congress. They stand for the purposes of taxation in the same position as other tangible personal property. A state tax upon a foreign built yacht used only in another state or in foreign waters would unquestionably be invalid irrespective of the owner's residence or domicile.

The question then is whether the principles which prevent state tax legislation from having extra-territorial force apply in the same degree to federal legislation. The underlying principle, as we have seen, is that taxes are the consideration for protection afforded and it is contended by the Government that while state tax laws may be invalid as affecting property outside the state because the state is powerless to furnish protection yet that a national enactment cannot fail for that reason because the United States government has power to afford protection to the persons and property of its citizens abroad. It is said that an independent nation has power to protect property beyond its territorial limits which no component part of that nation can have and, consequently, that limitations upon the taxing power of the states have no necessary effect upon the validity of the present statute.

34 I think it the better view that these contentions of the Government are correct. The national government has a far-reaching arm. It may afford in many ways protection to the property of its citizens located in foreign countries. In case of injury it may demand indemnity from other nations. Congress has already enacted laws with respect to the issue of certificates of ownership and passports to unregistered vessels owned by

* The lex situs rule with respect to tangible personal property should be stated in modified form when considering vessels registered under the laws of the United States when incidentally or temporarily in a state other than that of their home port. As said by the Supreme Court in Pullman's Car Co. vs. Pennsylvania, 141 U. S. 18, 23:

"Ships or vessels, indeed, engaged in interstate or foreign commerce upon the high seas, or other waters which are a common highway, and having their home port, at which they are registered under the laws of the United States, at the domicil of their owners in one State, are not subject to taxation in another State at whose ports they incidentally and temporarily touch for the purpose of delivering or receiving passengers or freight. But that is because they are not, in any proper sense, abiding within its limits, and have no continuous presence or actual situs within its jurisdiction, and, therefore, can be taxed only at their legal situs, their home port and the domicil of their owners."

When, however, even a registered vessel has a continuous presence—an actual situs—in a state other than that of the owner's domicile or port of register, it is subject to taxation there. Old Dominion Steamship Co. v. Virginia, 198 U. S. 299; Hays v. Pacific Mail Steamship Co., 17 How. 596; see also Ayer & Lord Co. v. Kentucky, 202 U. S. 409; St. Louis v. Ferry Co., 11 Wall. 423.

citizens (R. S. Secs. 4190, 4308) which might afford some protection in foreign countries and it has, unquestionably, power to enact laws of much broader scope. I should be unable to hold that legislation clearly and unequivocally imposing taxes upon foreign built yachts owned by citizens and located in foreign countries would be unconstitutional because by reason of the inability of the United States to afford protection to such property, there would be no consideration for the payment of such taxes, and the owner would be, consequently, deprived of his property without due process of law.

But such a tax would be extraordinary in its nature. If imposed it should be by clear and express enactment. It ought not to depend upon any doubtful construction. If Congress desire to exercise the power of the national government to go beyond its territorial jurisdiction in levying taxes—a power inherent in the United States because it is a nation and more than a state—it ought to employ language leaving no doubt as to its intention. The presumption should be that a tax law applies only to subjects within the territorial jurisdiction. Although Congress might provide for the grant of documents to foreign built yachts owned by citizens which
35 would have great protective value the steps which it has taken in that direction have been slight and the passports which it has provided for are granted only to vessels departing from the United States. The statute uses broad language, but I find nothing in it or in prior legislation clearly evidencing an intention on the part of Congress to tax the use of foreign built yachts in foreign waters and wholly outside the limits of the United States. The provisions are, in my opinion, consistent with an intention to tax only the use of such yachts in the waters of this country. Possibly the extent of such use may be immaterial, but I think that such use, to some extent, must be shown to bring a case within the statute.*

36 Furthermore, whatever doubt there might be as to the application of the statute in the case of a citizen of the United States residing in this country and owning a foreign built yacht used only in foreign waters, there can be no question, in my opinion, that a citizen domiciled in a foreign country and owning such a yacht is not liable to the tax. Certainly the liability of a citizen domiciled and resident in France for the use of a foreign built yacht in foreign waters should be established by clear and certain language, and in this case it is not only doubtful whether the statute

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*It must be clearly understood that this conclusion is reached with reference to the allegations in the Bennett and Goelet answers that the yachts belonging to these defendants have not been and are not within the jurisdiction of the United States and that each has acquired a permanent situs abroad. I construe these allegations to wholly negative use in the United States and I have no intention to hold that a yacht belonging to a resident citizen may acquire any such situs in a foreign country as will permit her owner to use her to any considerable extent in the waters of the United States without paying the tax. Whether she could be so used to any extent whatever is a question not presented by the pleadings and upon which no opinion is expressed.

I construe the allegations in the Billings case to state a substantial use partly within and partly without the waters of the United States and such use I think comes clearly within the statute.

applies to such use, but its language is inconsistent with its application to non-residents. The section in question provides that the tax shall be levied and collected "by the collector of customs nearest the residence of the managing owner." Who is the collector of customs nearest the residence of the defendant Goelet? Is it the collector of the most eastern district in Maine because that district is nearest to Paris? It seems evident from this provision alone that Congress considered that it was dealing with and intended only to deal with, yacht owners residing in this country.

The next question is whether the tax was properly leviable on September 1, 1909.

The Act went into effect on August 6, 1909. The section provides, as we have seen, that a tonnage tax "shall be levied and collected annually on the first day of September * * * upon the use of every foreign built yacht * * * now or hereafter owned or chartered for more than six months."

37 In my opinion the six months' limitation applies only to yachts chartered. Such is the natural interpretation of the language used. It might fairly be expected that a charter should run for some extended period to subject a charterer to a tax, but no particular reason appears why continued ownership for any stated period should be required. Indeed, a requirement of six months' ownership would be a direct invitation to transfers to avoid the tax.

Does, then, the fact that less than a month elapsed between the passage of the Act and September 1, 1909, establish that the full tax was improperly levied upon that date?

It is urged by the defendants that as the tax is one upon use, it ought to have some fair relation to the actual enjoyment of the privilege taxed and that it must have been the intention of Congress, in enacting the legislation just prior to the close of the year, to lay an annual tax upon future use and not to penalize past use, and that if a tax for past use be levied it should be apportioned according to the period of actual use prior to September 1st, 1909.

There is much force in these contentions but I think that they are not well founded. The language of the statute, speaking on August 6th, 1909, is that the use of yachts "now or hereafter owned" shall be taxed on September 1st. The section says that the use of yachts owned at the time of its passage or thereafter acquired shall be taxed and, in my opinion, Congress intended that such

38 tax should be levied on the first day of every September following the enactment of the statute. While the tax is collectible annually according to a given situation on September 1st, there is nothing in the statute to indicate that a full year's use is a prerequisite to liability, nor is there any provision for apportionment. I, therefore, hold that the tax was properly leviable on September 1, 1909. If this construction gives the statute a retrospective operation—and I fail to see that it does—it is nevertheless adopted because it is, in my opinion, required by the unequivocal language used.

The fourth question is as to the necessity of showing actual use of the yachts during the year prior to September 1, 1909.

One of the defendants alleges in his answer that his yacht was out of commission during the year preceding the first of September, 1909; was laid up during that year, and was not actually used by any person.

The statute seems to distinguish between use and ownership. It imposes a novel tax—a tax on use. There is nothing by way of precedent to aid in the determination whether Congress intended that the statute should apply only in cases where owners use their yachts for yachting purposes during the year prior to the assessment of the tax, or whether it intended that the tax should cover the privilege of using. Considering the object of the statute and the reason of the matter, I think the latter interpretation the
39 correct one, although I fully appreciate the very narrow distinction between such a tax on the privilege of using and a tax on ownership. Still, I can see no reason why Congress should distinguish between the yacht owner who chooses to put his yacht in commission and employ it as a pleasure craft, and the owner who prefers in a particular year to keep his yacht laid up. The latter has in one sense the use of his yacht, although he does not chose to sail it. I have already held that use by the owner for any particular length of time is not necessary to the application of the statute, and I now feel constrained to further hold that no particular kind of use is required—that a yacht owner who keeps his yacht laid up is nevertheless liable to the tax.

The final question to which it is necessary to give any extended consideration is whether the owner of a foreign built yacht can acquire any immunity under a treaty which will exempt him from the operation of this statute.

The defendant Rainey contends that as the treaty of 1815 with Great Britain provided that no higher or other duties or charges should be imposed in the United States upon British vessels than those imposed upon vessels of the United States he—as the owner of a British-built vessel—is not subject to the statute.

This defendant does not claim to be a British subject and it is by no means clear that he is entitled to invoke the protection of the treaty. But however that may be, it is well settled that when
40 a treaty is inconsistent with a subsequent act of Congress, the latter will prevail. Taylor vs. Morton, 2 Curtis, 454; and see Whitney vs. Robertson, 124 U. S. 190; Head Money Cases, 112 U. S. 580; Cherokee Tobacco Case, 11 Wal. 616; Ropes vs. Clinch, 8 Blatchf. 304.

Treaties are contracts between nations and by the Constitution are made the law of the land. But the Constitution does not declare that the law so established shall never be altered or repealed by Congress. Good faith toward the other contracting nation might require Congress to refrain from making any change, but if it does act, its enactment becomes the controlling law in this country. The other nation may have ground for complaint, but every person is bound to obey the law. And as a corollary it follows that no person acquires any vested right to the continued operation of a treaty.

It is now only necessary to briefly state the conclusions reached

with respect to the less important questions considered upon the various briefs.

(1) I am satisfied that an action in the nature of debt will lie against the yacht owners to enforce the collection of the tax and that the complaints state good causes of action.*

41 (2) I am also satisfied that the section in question is not void as a bill for raising revenue originating in the Senate and not in the House of Representatives. It appears that the section was proposed by the Senate as an amendment to a bill for raising revenue which originated in the House. That is sufficient. Having become an enrolled and duly authenticated Act of Congress, it is not for this Court to determine whether the amendment was or was not outside the purposes of the original bill.

For the reasons stated, the demurrers of the Government to the answers in the Billings, Pierce and Rainey cases are sustained. The demurrers in the Bennett and Goelet cases are overruled.

(Endorsed:) U. S. Circuit Court, Southern District N. Y., Filed Mar. 8, 1911, John A. Shields, Clerk.

42 *Order Sustaining Demurrer.*

At a Stated Term of the United States Circuit Court for the Southern District of New York, Held in the United States Court and Post-office Building, in the Borough of Manhattan, City of New York, on the 16th Day of March, 1911.

Present: Hon. Walter C. Noyes, Judge.

UNITED STATES OF AMERICA, Plaintiff,
against
ROY A. RAINEY, Defendant.

The issues of law raised by the demurrer of the plaintiff to the answer of the defendant herein, having duly come on to be heard by this Court at a Stated Term thereof, held in the United States Post Office and Court House Building in the Borough of Manhattan, City of New York, on the 10th day of February, 1911,

Now, after hearing Addison S. Pratt, Esq., Assistant United States Attorney, of counsel for the plaintiff in support of the said demurrer, and C. Andrade, Jr., Esq., of counsel for the defendant in opposition thereto, and due deliberation having been had thereon, it is upon motion of Henry A. Wise, United States Attorney for the Southern District of New York, attorney for the plaintiff,

* The defendants in these cases are liable as owners of the yachts. Why they should be described in the complaints as "managing owners" is not apparent. The only reference to managing owners in the statute seems to be for the purpose of fixing the jurisdiction of the collector of customs in cases where there are several part owners. Still, a sole owner is undoubtedly the managing owner of his yacht and there is no contention but that these defendants are the sole owners of their yachts. Consequently I think the presence of the word "managing" should not be held to affect the sufficiency of the complaint.

Ordered that the demurrer of the plaintiff to the answer herein be and the same hereby is sustained and that the plaintiff have final judgment against the defendant for the relief demanded in the amended complaint herein, together with its costs to be taxed by the Clerk of this Court.

WALTER C. NOYES,
U. S. Circuit Judge.

43 (Endorsed:) Due service of a copy of the within is hereby admitted. New York, M'ch 14, 1911. C. Andrade, Jr., Attorney for Def't.—U. S. Circuit Court, Southern District N. Y., Filed Mar. 16, 1911, John A. Shields, Clerk.

44 United States Circuit Court, Southern District of New York.

UNITED STATES
vs.
ROY A. RAINEY.

UNITED STATES
vs.
H. CLAY PIERCE.

UNITED STATES
vs.
CORNELIUS K. G. BILLINGS.

Memorandum Concerning Interest.

NOYES, *Circuit Judge:*

Taxes are exactions for the support of the government. They are not necessarily debts, although an action in the nature of debt may lie to enforce the duty to pay them. The tax statute may require the payment of interest upon overdue taxes; but if it fail to do so the common law rule is that interest is not recoverable.

The yacht tax statute, unlike other federal tax statutes, does not provide for the payment of interest and I cannot perceive any reason why the general rule should not be applicable in these cases.

The judgments may be resubmitted without any provisions for the recovery of interest.

45 *Order Denying Application for Interest.*

At a Stated Term of the United States Circuit Court, Held in and for the Southern District of New York, at the United States Court and Post-office Building, Borough of Manhattan, City of New York, on the 7th Day of July, 1911.

Present: Hon. Walter C. Noyes, Judge.

UNITED STATES OF AMERICA, Plaintiff,
vs.
ROY A. RAINEY, Defendant.

An application having heretofore been made to this Court by the plaintiff above named for the allowance of interest from the first day of September, 1909, on the amount of the tonnage tax sued for herein, as demanded in the complaint, and opposition thereto having been made by the defendant,

Now after hearing Addison S. Pratt, Esq., Assistant United States Attorney for the Southern District of New York, of counsel for the plaintiff, in support thereof, and C. Andrade, Jr., Esq., of counsel for the defendant, in opposition thereto, and due deliberation having been had thereon, on motion of C. Andrade, Jr., attorney for the defendant, it is

Ordered that the application of the plaintiff that it be allowed interest on the amount of the tonnage tax sued for herein be, and it hereby is denied.

WALTER C. NOYES,
U. S. Circuit Judge.

46 (Endorsed:) U. S. Circuit Court, Southern District N. Y., Filed Jul- 12, 1911, John A. Shields, Clerk.

47 *Judgment.*

United States Circuit Court, Southern District of New York.

UNITED STATES OF AMERICA, Plaintiff,
against
ROY A. RAINEY, Defendant.

The issues of law raised by the demurrer of the plaintiff to the answer of the defendant herein having duly come on to be heard by this Court at a Stated Term thereof held at the United States Court House and Post Office Building, in the Borough of Manhattan, City of New York, on the 10th day of February, 1911, and an order having been entered herein sustaining the said demurrer and directing that the plaintiff have final judgment against the defendant for the relief demanded in the amended complaint herein with costs,

Now on motion of Henry A. Wise, United States Attorney for the Southern District of New York, attorney for the plaintiff, it is

Ordered and adjudged that the plaintiff recover against the defendant the sum of $8,589. without interest, together with its costs and disbursements to be taxed by the Clerk of this Court, and amounting as taxed to the sum of $62.17, and amounting in all to the sum of $8,651.17, and that the plaintiff have execution therefor.

Judgment signed this 12th day of July, 1911.

JOHN A. SHIELDS, *Clerk.*

48 (Endorsed:) U. S. Circuit Court, Southern District N. Y., Filed Jul- 12, 1911, 4.40 P. M., John A. Shields, Clerk.

49 In the United States Circuit Court for the Southern District of New York.

UNITED STATES OF AMERICA, Plaintiff,
against
ROY A. RAINEY, Defendant.

Assignment of Errors.

Action #1.

And now comes Roy A. Rainey, the defendant above named, by Cipriano Andrade, Jr., his attorney, and, in connection, with his petition for a writ of error from the final judgment entered herein on the 12th day of July, 1911, in favor of the plaintiff and against the defendant in the sum of $8,651.17/100 makes and files the following assignment of errors in pursuance of the statute and rule in such case made and provided.

I.

That the court erred in not holding that section 37 of the act of the Congress of the United States entitled "An Act to provide Revenue, Equalize Duties and encourage the industries of the United States, and for other purposes" passed August 5, 1909, on its face shows that it was intended to operate prospectively, and that therefor- said tax is not payable until September 1910.

II.

That the court erred in not holding that section 37 of the
50 act of the Congress of the United States entitled "An Act to provide Revenue, Equalize Duties and encourage the industries of the United States, and for other purposes" passed August 5, 1909, does not levy a tax, but deprives defendant of his property without due process of law, in contravention of the Fifth Amendment to the Constitution of the United States.

III.

That the court erred in not holding that section 37 of the act of the Congress of the United States entitled "An Act to provide Revenue, Equalize Duties and encourage the industries of the United States, and for other purposes" passed August 5, 1909, insofar as it lays a duty of 35 per cent ad valorem is a direct tax, and void because not apportioned, in contravention of Article 1 Section 2, and Article 1 section 9 of the Constitution of the United States.

IV.

That the court erred in not holding that section 37 of the act of the Congress of the United States entitled "An Act to provide Revenue, Equalize Duties and encourage the industries of the United States, and for other purposes" passed August 5, 1909, insofar as it lays an annual tax of seven dollars per gross ton, being an excise tax is void for want of uniformity, in contravention of Article 1 Section 8 of the Constitution of the United States.

V.

That the court erred in not holding that the defendant's use of the yacht prior to August 5, 1909, tax-free, was property, and
51 that the collection of the tax in this case would be a deprivation of such property without due process of law, in contravention of the Fifth Amendment to the Constitution of the United States.

VI.

That the court erred in not holding that a recovery in this action would destroy rights vested in the defendant under the British Treaty of July 3, 1815, and would deprive the defendant of his property without due process of law.

VII.

That the court erred in not holding that section 37 of the act of the Congress of the United States entitled "An Act to provide Revenue, Equalize Duties and encourage the industries of the United States, and for other purposes" passed August 5, 1909, does not authorize any action in personam against any owner or managing owner.

VIII.

That the court erred in not holding that section 37 of the act of the Congress of the United States entitled "An Act to provide Revenue, Equalize Duties and encourage the industries of the United States, and for other purposes" passed August 5, 1909, is void as being a bill for raising revenue, and that it originated in the Senate and not in the House of Representatives, in contravention of Article 1, Section 7 of the Constitution of the United States.

52

IX.

That the court erred in holding that the six months' limitation in section 37 of the act of the Congress of the United States entitled "An Act to provide Revenue, Equalize Duties and encourage the industries of the United States, and for other purposes" passed August 5, 1909, applied only to a charter and did not apply to an ownership of a foreign built yacht.

X.

That the court erred in sustaining the demurrer to the answer to the amended complaint.

XI.

That the court erred in entering judgment in favor of the plaintiff and against the defendant in the sum of $8,651.17/100.

Dated New York, July 12, 1911.

C. ANDRADE, Jr.,
Attorney for Defendant.

(Endorsed:) A copy of the within paper has been this day received at this office. Jul- 13, 1911. Henry A. Wise. U. S. Attorney.—U. S. Circuit Court, Southern District N. Y., Filed Jul- 13, 1911. John A. Shields, Clerk.

53

National Surety Company.

Circuit Court of the United States of America for the Southern District of New York, in the Second Circuit.

Bond for Damages and Costs.

UNITED STATES OF AMERICA, Plaintiff-Respondent,
vs.
ROY A. RAINEY, Defendant-Appellant.

Action No. 1.

Know all Men by these Presents, That the National Surety Company, a corporation under the laws of the State of New York, with its principal place of business at No. 115 Broadway, in the City of New York, County and State of New York, is held and firmly bound unto the above named United States of America in the sum of Ten thousand ($10,000.00) dollars, to be paid to the said United States of America for the payment of which well and truly to be made, it binds itself, its successors and assigns, jointly and severally, firmly by these presents. Sealed with its seal, and dated the 12th day of July in the year of our Lord one thousand nine hundred and eleven.

Whereas, the above named Roy A. Rainey has prosecuted a Writ of Error to the Supreme Court of the United States to reverse the judgment rendered in the above entitled suit, by the Judge of the Circuit Court of the United States for the Southern District of New York.

Now, therefore, the condition of this obligation is such, that if the above named Roy A. Rainey shall prosecute said Writ of Error to effect, and answer all damages and costs if he fail to make said Writ of Error good, then this obligation shall be void, otherwise the same shall be and remain in full force and virtue.

Sealed and delivered, and taken and acknowledged this 12th day of July, 1911, before me,

NATIONAL SURETY COMPANY,
By WM. A. THOMPSON,
Res. Vice-President.

M. W. GEWECKE,
Res. Assistant Secretary.

54 *Copy of By-law.*

Be it Remembered, That at a regular meeting of the Board of Directors of the National Surety Company, duly called and held on the fourth day of February, 1908, a quorum being present, the following By-Law was adopted:

"ARTICLE XIII. SEC. 1. Signatures Required.—All bonds, recognizances, or contracts of indemnity, policies of insurance, and all other writings obligatory in the nature thereof shall be signed by the President, a Vice-President, a Resident Vice-President or Attorney-in-Fact, and except when signed by an Attorney-in-Fact shall have the seal of the Company affixed thereto, duly attested by the Secretary, an Assistant Secretary or Resident Assistant Secretary. All Vice-Presidents and Resident Vice-Presidents shall each have authority to sign such instruments, whether the President be absent or incapacitated or not; and the Assistant Secretaries and Resident Assistant Secretaries shall each have authority to seal and attest such instruments, whether the Secretary be absent, or incapacitated or not. All such instruments executed as herein provided shall be as binding upon the Company as if the same were signed by the President and duly sealed and attested by the Secretary."

CITY AND COUNTY OF NEW YORK, *ss:*

I, M. W. Gewecke, Res. Assistant Secretary of the National Surety Company, have compared the foregoing By-Law with the original thereof, as recorded in the Minute Book of said Company, and do certify that the same is a correct and true transcript therefrom, and of the whole of Article XIII, Section 1 of said original By-Law.

Given under my hand and the seal of the Company, at the City of New York, this 12th day of July, 1911.

M. W. GEWECKE,
Res. Assistant Secretary.

CITY AND COUNTY OF NEW YORK, *ss:*

On this 12th day of July, 1911, before me personally appeared Wm. A. Thompson, Res. Vice-President of the National

Surety Company, with whom I am personally acquainted, who, being by me duly sworn, said that he resides in the County of New York; that he is the Res. Vice-President of the National Surety Company, the corporation described in and which executed the within instrument; that he knows the corporate seal of said Company; that the seal affixed to the within instrument is such corporate seal; that it was affixed by order of the Board of Directors of said Company, and that he signed said instrument as Res. Vice-President of said Company by like authority; and that the liabilities of said Company do not exceed its assets, as ascertained in the manner provided in Section 3, Chapter 720, of New York Session laws of 1893. And the said Wm. A. Thompson further said that he is acquainted with M. W. Gewecke and knows him to be the Res. Assistant Secretary of said Company; that the signature of the said M. W. Gewecke subscribed to the said instrument is in the genuine handwriting of the said M. W. Gewecke and was thereto subscribed by the like order of the said Board of Directors and in the presence of him, the said Res. Vice-President.

WM. F. GAYNOR,
Notary Public, etc.

[Endorsed:] Circuit Court, Southern Dist. United States of America, Plaintiff-Respondent, against Roy A. Rainey, Defendant-Appellant. Bond for damages and costs. Surety: National Surety Company. Action No. 1. I approve of the within bond, and of the sufficiency of the Surety. —— ——.

Approved as to form and also as to sufficiency of sureties, with reservation, however, to the Def't in Error, of the right at any time to examine the proper officers of the Surety Company, under oath, touching its assets, liabilities and financial condition generally. Walter C. Noyes, U. S. Circuit Judge.—U. S. Circuit Court, Southern District N. Y., Filed Jul- 13, 1911, John A. Shields, Clerk.

55 By the Honorable Walter C. Noyes, one of the Judges of the Circuit Court of the United States for the Southern District of New York, in the Second Circuit, to the United States of America, Greeting:

You are hereby cited and admonished to be and appear before the Supreme Court of the United States, to be holden at the City of Washington on the 12 day of August, 1911, pursuant to a writ of error filed in the Clerk's Office of the Circuit Court of the United States for the Southern District of New York, wherein Roy A. Rainey is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment in said writ of error mentioned should not be corrected and speedy justice should not be done in that behalf.

Given under my hand at the Borough of Manhattan, in the City of New York, in the District and Circuit above named, this 13th day of July, in the year of our Lord One Thousand Nine Hundred and

Eleven, and of the Independence of the United States the One Hundred and Thirty-sixth.

WALTER C. NOYES,
Judge of the Circuit Court of the United States for the Southern District of New York, in the Second Circuit.

56 [Endorsed:] Law 4/224. Supreme Court of the United States. Roy A. Rainey, Plaintiff in Error, vs. United States of America, Defendant in Error. (Original.) Citation. Action in Error. 527 Fifth Avenue, Borough of Manhattan, City of New York. A copy of the within paper has been this day received at this office, July 13, 1911. Henry A. Wise, U. S. Attorney. U. S. Circuit Court, Southern District N. Y. Filed Jul- 13, 1911. John A. Shields, Clerk.

[Endorsed:] United States Supreme Court. Roy A. Rainey, Pl'ff in Error, vs. The United States of America, Def't in Error. Transcript of Record. Office of the clerk Supreme Court U. S. Received July 27, 1911.

Endorsed on cover: File No. 22,824. S. New York C. C. U. S. Term No. 74. Roy A. Rainey, plaintiff in error, vs. The United States. Filed July 28th, 1911. File No. 22,824.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1913.

No. 623.

THE UNITED STATES

VS.

H. CLAY PIERCE.

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

INDEX.

	Original.	Print.
Certificate from the United States Circuit Court of Appeals for the Second Circuit	1	1
Statement	1	1
Question certified	2	1
Judges' certificate	3	2
Clerk's certificate	4	2

1 United States Circuit Court of Appeals for the Second Circuit.

UNITED STATES OF AMERICA, PLAINTIFF IN ERROR (plaintiff below), *against* H. CLAY PIERCE, DEFENDANT IN ERROR (defendant below).	Action No. 1.

On writ of error to the United States Circuit Court for the Southern District of New York. Before Lecombe, Coxe, and Ward, circuit judges.

This cause having come on for argument before the court, after hearing Addison S. Pratt, Esq., assistant United States attorney for the Southern District of New York, on behalf of the plaintiff in error, and William D. Guthrie, Esq., on behalf of the defendant in error, it is, in view of the important question arising upon the record herein, the doubt which the court entertains as to the correct decision thereof and the fact that this case is now pending in the Supreme Court of the United States upon a writ of error sued out by the defendant in error here,

Ordered that the statement and question here following be certified to the Supreme Court of the United States for its instruction thereon, viz:

2 The United States, plaintiff below, sued out a writ of error to this court to review a judgment of the United States Circuit Court for the Southern District of New York in the above entitled cause, entered July 13, 1911, against the defendant below, for the amount of a tax imposed by section 37 of the tariff act of August 5, 1909 (ch. 6, 36 Stat., 112), for the year ended September 1, 1909, upon the use of the foreign-built yacht "Yacona," owned by the defendant, assigning as error the refusal of the court to allow interest on the amount of the tax sued for. As the defendant has sued out a writ of error to the United States Supreme Court to review the judgment against him on the merits for the principal amount of the tax, only the question of interest was raised in this court.

The demurrer of the United States to the second amended answer of the defendant was sustained in the court below, and judgment was thereupon entered for the amount of the tax, to wit, the sum of $3,682.00, with costs, but the application of the United States for the allowance of interest from September 1, 1909, the date on which the tax was held to be payable, was denied.

Upon the foregoing state of facts this court, in order that it may properly decide the question of law involved, respectfully requests the instruction of the Supreme Court of the United States upon the following question, to wit:

Is the United States entitled to recover interest upon the tax imposed upon the use of foreign-built yachts in and by section 37 of the tariff act of August 5, 1909?

3 It is further ordered that a copy of this certificate, under the seal of the court, be filed with the clerk of the Supreme Court of the United States at Washington in the District of Columbia.

E. HENRY LACOMBE,
ALFRED C. COXE,
H. G. WARD,
Judges of the United States Circuit Court of Appeals for the Second Circuit, sitting in said cause.

4 United States Circuit Court of Appeals for the Second Circuit

UNITED STATES OF AMERICA,
Second Judicial Circuit, ss:

I, William Parkin, clerk of the United States Circuit Court of Appeals for the Second Circuit, do hereby certify that the foregoing certificate and statement of facts in the case of United States of America against H. Clay Pierce, No. 1, was duly filed and entered of record in my office by order of said court, and, as directed by said court, the said certificate is by me forwarded to the Supreme Court of the United States for its action thereon.

In witness whereof I have hereunto subscribed my name and affixed the seal of said court, at the city of New York, this 1st day of July, A. D. 1913.

[SEAL.]

WM. PARKIN,
Clerk of the United States Circuit Court of Appeals for the Second Circuit.

(Indorsed:) U. S. Circuit Court of Appeals for the Second Circuit. United States of America, plaintiff in error (plaintiff below), vs. H. Clay Pierce, defendant in error (defendant below). Action No. 1. Certificate of question of law to Supreme Court. H. Snowden Marshall, United States attorney, attorney for United States. United States Circuit Court of Appeals, Second Circuit. Filed July 1, 1913. William Parkin, Clerk.

(Indorsement on cover:) File No. 23,774. U. S. Circuit Court Appeals, 2d circuit. Term No. 623. The United States vs. H. Clay Pierce. (Certificate.) Filed July 2d, 1913. File No. 23,774.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1913.

No. 624.

THE UNITED STATES

vs.

H. CLAY PIERCE.

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

INDEX.

	Original.	Print.
Certificate from the United States Circuit Court of Appeals for the Second Circuit	1	1
Statement	1	1
Question certified	3	1
Judges' certificate	3	2
Clerk's certificate	4	2

1 United States Circuit Court of Appeals for the Second Circuit.

UNITED STATES OF AMERICA, PLAINTIFF IN ERROR (plaintiff below), *against* H. CLAY PIERCE, DEFENDANT IN ERROR (DEFENDANT below).	Action No. 2.

On writ of error to the United States Circuit Court for the Southern District of New York. Before Lacombe, Coxe, and Ward, circuit judges.

This cause having come on for argument before the court, after hearing Addison S. Pratt, Esq., assistant United States attorney for the Southern District of New York, on behalf of the plaintiff in error, and William D. Guthrie, Esq., on behalf of the defendant in error, it is, in view of the important question arising upon the record herein, the doubt which the court entertains as to the correct decision thereof and the fact that this case is now pending in the Supreme Court of the United States upon a writ of error sued out by the defendant in error here,

Ordered that the statement and question here following be certified to the Supreme Court of the United States for its instruction thereon, viz:

2 The United States, plaintiff below, sued out a writ of error to this court to review a judgment of the United States Circuit Court for the Southern District of New York in the above-entitled cause, entered July 13, 1911, against the defendant below, for the amount of a tax imposed by section 37 of the tariff act of August 5, 1909 (ch. 6, 36 Stat., 112), for the year ended September 1, 1910, upon the use of the foreign-built yacht "Yacona," owned by the defendant, assigning as error the refusal of the court to allow interest on the amount of the tax sued for. As the defendant has sued out a writ of error to the United States Supreme Court to review the judgment against him on the merits for the principal amount of the tax, only the question of interest was raised in this court.

The case was tried by the court, a jury having been duly waived by stipulation in writing. The court signed a decision containing findings of fact and conclusions of law and held that the United States was entitled to judgment against the defendant for the sum of $3,682.00, the amount of the tax sued for, with costs but without interest, and it denied the application of the United States for the allowance of interest from September 1, 1910, the date of which the tax was held to be payable. The United States excepted to such decision, and judgment was entered for the amount of the tax, to wit, the sum of $3,682.00 with costs but without interest.

Upon the foregoing state of facts this court, in order that it may properly decide the question of law involved, respectfully requests

the instruction of the Supreme Court of the United States upon the following question, to wit:

3 Is the United States entitled to recover interest upon the tax imposed upon the use of foreign-built yachts in and by section 37 of the tariff act of August 5, 1909?

It is further ordered that a copy of this certificate, under the seal of the court, be filed with the clerk of the Supreme Court of the United States at Washington in the District of Columbia.

E. HENRY LACOMBE,
ALFRED C. COXE,
H. G. WARD,
Judges of the United States Circuit Court of Appeals for the Second Circuit, sitting in said cause.

4 United States Circuit Court of Appeals for the Second Circuit.

UNITED STATES OF AMERICA,
Second Judicial Circuit, ss:

I, William Parkin, clerk of the United States Circuit Court of Appeals for the Second Circuit, do hereby certify that the foregoing certificate and statement of facts in the case of United States of America against H. Clay Pierce, No. 2, was duly filed and entered of record in my office by order of said court, and as directed by said court, the said certificate is by me forwarded to the Supreme Court of the United States for its action thereon.

In witness whereof I have hereunto subscribed my name and affixed the seal of said court, at the city of New York, this 1st day of July, A. D. 1913.

[SEAL.] WM. PARKIN,
Clerk of the United States Circuit Court of Appeals for the Second Circuit.

(Indorsed:) U. S. Circuit Court of Appeals for the Second Circuit. United States of America, plaintiff in error (plaintiff below), against H. Clay Pierce, defendant in error (defendant below). Action No. 2. Certificate of question of law to Supreme Court. H. Snowden Marshall, United States attorney, attorney for United States. United States Circuit Court of Appeals. Second Circuit. Filed July 1, 1913. William Parkin, clerk.

(Indorsement on cover:) File No. 23,775. U. S. Circuit Court Appeals, 2d Circuit. Term No. 624. The United States vs. H. Clay Pierce. (Certificate.) Filed July 2d, 1913. File No. 23,775.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1913.

No. 625.

THE UNITED STATES

vs.

CORNELIUS G. K. BILLINGS.

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

INDEX.

	Original.	Print.
Certificate from the United States Circuit Court of Appeals for the Second Circuit	1	1
Statement	1	1
Question certified	2	1
Judges' certificate	3	2
Clerk's certificate	4	2

1 United States Circuit Court of Appeals for the Second Circuit.

UNITED STATES OF AMERICA, PLAINTIFF IN error (plaintiff below), *against* CORNELIUS K. G. BILLINGS, DEFENDANT IN error (defendant below).	Action No. 1. No. 100.

On writ of error to the United States Circuit Court for the Southern District of New York. Before Lacombe, Coxe, and Ward, circuit judges.

This cause having come on for argument before the court, after hearing Addison S. Pratt, Esq., assistant United States attorney for the Southern District of New York, on behalf of the plaintiff in error, and William D. Guthrie, Esq., on behalf of the defendant in error, it is (in view of the important question arising upon the record herein, the doubt which the court entertains as to the correct decision thereof, and the fact that this case is now pending in the Supreme Court of the United States upon a writ of error sued out by the defendant in error here)—

Ordered that the statement and question here following be certified to the Supreme Court of the United States for its instruction thereon, viz:

2 The United States, plaintiff below, sued out a writ of error to this court to review a judgment of the United States Circuit Court for the Southern District of New York in the above-entitled cause, entered July 13, 1911, against the defendant below, for the amount of a tax imposed by section 37 of the tariff act of August 5, 1909 (ch. 6, 36 Stat., 112), for the year ended September 1, 1909, upon the use of the foreign-built yacht "Vanadis," owned by the defendant, assigning as error the refusal of the court to allow interest on the amount of the tax sued for. As the defendant has sued out a writ of error to the United States Supreme Court to review the judgment against him on the merits for the principal amount of the tax, only the question of interest was raised in this court.

The demurrer of the United States to the amended answer of the defendant was sustained in the court below, and judgment was thereupon entered for the amount of the tax, to wit, the sum of $7,644, with costs, but the application of the United States for the allowance of interest from September 1, 1909, the date on which the tax was held to be payable, was denied.

Upon the foregoing state of facts this court, in order that it may properly decide the question of law involved, respectfully requests the instruction of the Supreme Court of the United States upon the following question, to wit:

Is the United States entitled to recover interest upon the tax imposed upon the use of foreign-built yachts in and by section 37 of the tariff act of August 5, 1909?

It is further ordered that a copy of this certificate, under the seal of the court, be filed with the clerk of the Supreme Court of the United States at Washington, in the District of Columbia.

E. HENR LACOMBE,
ALFRED C. COXE,
H. G. WARD,
Judges of the United States Circuit Court of Appeals for the Second Circuit, sitting in said cause.

United States Circuit Court of Appeals for the Second Circuit.

UNITED STATES OF AMERICA,
Second Judicial Circuit, ss:

I, William Parkin, clerk of the United States Circuit Court of Appeals for the Second Circuit, do hereby certify that the foregoing certificate and statement of facts in the case of United States of America against Cornelius K. G. Billings, No. 1, was duly filed and entered of record in my office by order of said court, and as directed by said court the said certificate is by me forwarded to the Supreme Court of the United States for its action thereon.

In witness whereof I have hereunto subscribed my name and affixed the seal of said court at the city of New York this 1st day of July, A. D. 1913.

[SEAL.]

WM. PARKIN,
Clerk of the United States Circuit Court of Appeals for the Second Circuit.

(Indorsed:) U. S. Circuit Court of Appeals for the Second Circuit. United States of America, plaintiff in error (plaintiff below), against Cornelius K. G. Billings, defendant in error (defendant below). Certificate of question of law to Supreme Court. Henry A. Wise, United States attorney, attorney for United States. United States Circuit Court of Appeals, Second Circuit. Filed July 1, 1913. William Parkin, clerk.

(Indorsement on cover:) File No. 23,776. U. S. Circuit Court of Appeals, 2d Circuit. Term No. 625. The United States vs. Cornelius G. K. Billings. (Certificate.) Filed July 2d, 1913. File No. 23,776.

WASHINGTON: GOVERNMENT PRINTING OFFICE: 1913

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1913.

No. 626.

THE UNITED STATES

vs.

CORNELIUS G. K. BILLINGS.

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

INDEX.

	Original.	Print.
Certificate from the United States Circuit Court of Appeals for the Second Circuit	1	1
Statement	1	1
Question certified	3	1
Judges' certificate	3	2
Clerk's certificate	4	2

1 United States Circuit Court of Appeals for the Second Circuit.

UNITED STATES OF AMERICA, PLAINTIFF IN ERROR (PLAINTIFF below),
against
CORNELIUS K. G. BILLINGS, DEFENDANT IN ERROR (DEFENDANT below).
} Action No. 2.

On writ of error to the United States Circuit Court for the Southern District of New York. Before Lacombe, Coxe, and Ward, circuit judges.

This cause having come on for argument before the court, after hearing Addison S. Pratt, Esq., assistant United States attorney for the Southern District of New York, on behalf of the plaintiff in error, and William D. Guthrie, Esq., on behalf of the defendant in error, it is, in view of the important question arising upon the record herein, the doubt which the court entertains as to the correct decision thereof and the fact that this case is now pending in the Supreme Court of the United States upon a writ of error sued out by the defendant in error here,

Ordered that the statement and question here following be certified to the Supreme Court of the United States for its instruction thereon, viz:

2 The United States, plaintiff below, sued out a writ of error to this court to review a judgment of the United States Circuit Court for the Southern District of New York in the above-entitled cause, entered July 13, 1911, against the defendant below, for the amount of a tax imposed by section 37 of the tariff act of August 5, 1909 (ch. 6, 36 Stat., 112), for the year ended September 1, 1910, upon the use of the foreign-built yacht "Vanadis" owned by the defendant, assigning as error the refusal of the court to allow interest on the amount of the tax sued for. As the defendant has sued out a writ of error to the United States Supreme Court to review the judgment against him on the merits for the principal amount of the tax, only the question of interest was raised in this court.

The case was tried by the court, a jury having been duly waived by stipulation in writing. The court signed a decision containing findings of fact and conclusions of law, and held that the United States was entitled to judgment against the defendant for the sum of $7,644.00, the amount of the tax sued for, with costs, but without interest, and it denied the application of the United States for the allowance of interest from September 1, 1910, the date on which the tax was held to be payable. The United States excepted to such decision and judgment was entered for the amount of the tax, to wit, the sum of $7,644.00 with costs, but without interest.

3 Upon the foregoing state of facts this court, in order that it may properly decide the question of law involved, respect-

fully requests the instruction of the Supreme Court of the United States upon the following question, to wit:

Is the United States entitled to recover interest upon the tax imposed upon the use of foreign-built yachts in and by section 37 of the tariff act of August 5, 1909?

It is further ordered that a copy of this certificate, under the seal of the court, be filed with the clerk of the Supreme Court of the United States at Washington, in the District of Columbia.

E. HENRY LACOMBE,
ALFRED C. COXE,
H. G. WARD,
Judges of the United States Circuit Court of Appeals for the Second Circuit, sitting in said cause.

4 United States Circuit Court of Appeals for the Second Circuit.

UNITED STATES OF AMERICA,
Second Judicial Circuit, ss:

I, William Parkin, clerk of the United States Circuit Court of Appeals for the Second Circuit, do hereby certify that the foregoing certificate and statement of facts in the case of United States of America against Cornelius K. G. Billings, No. 2, was duly filed and entered of record in my office by order of said court, and, as directed by said court, the said certificate is by me forwarded to the Supreme Court of the United States for its action thereon.

In witness whereof I have hereunto subscribed my name and affixed the seal of said court, at the city of New York, this 1st day of July, A. D. 1913.

[SEAL.]

WM. PARKIN,
Clerk of the United States Circuit Court of Appeals for the Second Circuit.

(Indorsed:) U. S. Circuit Court of Appeals for the Second Circuit. United States of America, plaintiff in error (plaintiff below), against Cornelius K. G. Billings, defendant in error (defendant below). Action No. 2. Certificate of question of law to Supreme Court. H. Snowden Marshall, United States attorney, attorney for United States. United States Circuit Court of Appeals, Second Circuit. Filed July 1, 1913. William Parkin, clerk.

(Indorsement on cover:) File No. 23,777. U. S. Circuit Court of Appeals, 2d Circuit. Term No. 626. The United States *vs.* Cornelius K. G. Billings. (Certificate.) Filed July 2d, 1913. File No. 23,777.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1913.

No. 627.

THE UNITED STATES

vs.

ROY A. RAINEY.

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

INDEX.

	Original.	Print.
Certificate from the United States Circuit Court of Appeals for the Second Circuit	1	1
Statement	1	1
Question certified	2	1
Judges' certificate	3	2
Clerk's certificate	4	2

1 United States Circuit Court of Appeals for the Second Circuit.

UNITED STATES OF AMERICA, PLAINTIFF IN ERROR (plaintiff below), *against* ROY A. RAINEY, DEFENDANT IN ERROR (DEFENDANT below).	Action No. 1.

On writ of error to the United States Circuit Court for the Southern District of New York. Before Lacombe, Coxe, and Ward, circuit judges.

This cause having come on for argument before the court, after hearing Addison S. Pratt, Esq., assistant United States attorney for the Southern District of New York, on behalf of the plaintiff in error, and C. Andrade, Esq., on behalf of the defendant in error, it is, in view of the important question arising upon the record herein, the doubt which the court entertains as to the correct decision thereof and the fact that this case is now pending in the Supreme Court of the United States upon a writ of error sued out by the defendant in error here,

Ordered that the statement and question here following be certified to the Supreme Court of the United States for its instruction thereon, viz:

2 The United States, plaintiff below, sued out a writ of error to this court to review a judgment of the United States Circuit Court for the Southern District of New York in the above-entitled cause, entered July 12, 1911, against the defendant below, for the amount of a tax imposed by section 37 of the tariff act of August 5, 1909 (ch. 6, 36 Stat., 112), for the year ended September 1, 1909, upon the use of the foreign-built yacht "Cassandra," owned by the defendant, assigning as error the refusal of the court to allow interest on the amount of the tax sued for. As the defendant has sued out a writ of error to the United States Supreme Court to review the judgment against him on the merits for the principal amount of the tax, only the question of interest was raised in this court.

The demurrer of the United States to the answer of the defendant was sustained in the court below and judgment was thereupon entered for the amount of the tax, to wit, the sum of $8,589.00, with costs, but the application of the United States for the allowance of interests from September 1, 1909, the date on which the tax was held to be payable, was denied.

Upon the foregoing state of facts this court, in order that it may properly decide the question of law involved, respectfully requests the instruction of the Supreme Court of the United States upon the following question, to wit:

Is the United States entitled to recover interest upon the tax imposed upon the use of foreign-built yachts, in and by section 37 of the tariff act of August 5, 1909?

3 It is further ordered that a copy of this certificate, under the seal of the court, be filed with the clerk of the Supreme Court of the United States at Washington, in the District of Columbia.

E. HENRY LACOMBE,
ALFRED C. COXE,
H. G. WARD,
Judges of the United States Circuit Court of Appeals for the Second Circuit, sitting in said cause.

4 United States Circuit Court of Appeals for the Second Circuit.

UNITED STATES OF AMERICA,
Second Judicial Circuit, ss:

I, William Parkin, clerk of the United States Circuit Court of Appeals for the Second Circuit, do hereby certify that the foregoing certificate and statement of facts in the case of United States of America against Roy A. Rainey, No. 1, was duly filed and entered of record in my office by order of said court, and as directed by said court, the said certificate is by me forwarded to the Supreme Court of the United States for its action thereon.

It witness whereof I have hereunto subscribed my name and affixed the seal of said court, at the city of New York, this 1st day of July, A. D. 1913.

[SEAL.] WM. PARKIN,
Clerk of the United States Circuit Court of Appeals for the Second Circuit.

(Indorsed:) U. S. Circuit Court of Appeals for the Second Circuit. United States of America, plaintiff in error (plaintiff below), against Roy A. Rainey, defendant in error (defendant below). Action No. 1. Certificate of question of law to Supreme Court. H. Snowden Marshall, United States attorney, attorney for United States. United States Circuit Court of Appeals, Second Circuit, filed July 1, 1913. William Parkin, Clerk.

(Indorsement on cover:) File No. 23,778. U. S. Circuit Court Appeals, 2d Circuit. Term No. 627. The United States vs. Roy A. Rainey. (Certificate.) Filed July 2d, 1913. File No. 23,778.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1913.

No. 628.

THE UNITED STATES

vs.

ROY A. RAINEY.

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

INDEX.

	Original.	Print.
Certificate from the United States Circuit Court of Appeals for the Second Circuit	1	1
Statement	1	1
Question certified	3	2
Judges' certificate	3	2
Clerk's certificate	4	2

1 United States Circuit Court of Appeals for the Second Circuit.

UNITED STATES OF AMERICA, PLAINTIFF IN ERROR (plaintiff below), *against* ROY A. RAINEY, DEFENDANT IN ERROR (DEFENDANT below).	Action No. 2.

On writ of error to the United States Circuit Court for the Southern District of New York. Before Lacombe, Coxe, and Ward, circuit judges.

This cause having come on for argument before the court, after hearing Addison S. Pratt, Esq., assistant United States attorney for the Southern District of New York, on behalf of the plaintiff in error, and C. Andrade, Esq., on behalf of the defendant in error, it is, in view of the important question arising upon the record herein, the doubt which the court entertains as to the correct decision thereof and the fact that this case is now pending in the Supreme Court of the United States upon a writ of error sued out by the defendant in error here,

Ordered that the statement and question here following be certified to the Supreme Court of the United States for its instruction thereon, viz:

The United States, plaintiff below, sued out a writ of error to this court to review a judgment of the United States Circuit Court
2 for the Southern District of New York in the above-entitled cause, entered July 12, 1911, against the defendant below, for the amount of a tax imposed by section 37 of the tariff act of August 5, 1909 (ch. 6, 36 Stat., 112), for the year ended September 1, 1910, upon the use of the foreign-built yacht "Cassandra," owned by the defendant, assigning as error the refusal of the court to allow interest on the amount of the tax sued for. As the defendant has sued out a writ of error to the United States Supreme Court to review the judgment against him on the merits for the principal amount of the tax, only the question of interest was raised in this court. The case was tried by the court, a jury having been duly waived by stipulation in writing. The court signed a decision containing findings of fact and conclusions of law and held that the United States was entitled to judgment against the defendant for the sum of $8,589.00, the amount of the tax sued for, with costs, but without interest, and it denied the application of the United States for the allowance of interest from September 1, 1910, the date on which the tax was held to be payable. The United States excepted to such decision and judgment was entered for the amount of the tax, to wit, the sum of $8,589.00, with costs, but without interest.

Upon the foregoing state of facts this court, in order that it may properly decide the question of law involved, respectfully requests

3 the instruction of the Supreme Court of the United States upon the following question, to wit:

Is the United States entitled to recover interest upon the tax imposed upon the use of foreign-built yachts in and by section 37 of the tariff act of August 5, 1909?

It is further ordered that a copy of this certificate, under the seal of the court, be filed with the clerk of the Supreme Court of the United States at Washington, in the District of Columbia.

E. HENRY LACOMBE,
ALFRED C. COXE,
H. G. WARD,
Judges of the United States Circuit Court of Appeals for the Second Circuit, sitting in said cause.

4 United States Circuit Court of Appeals for the Second Circuit.

UNTED STATES OF AMERICA,
Second Judicial Circuit, ss:

I, William Parkin, clerk of the United States Circuit Court of Appeals for the Second Circuit, do hereby certify that the foregoing certificate and statement of facts in the case of United States of America against Roy A. Rainey, No. 2, was duly filed and entered of record in my office by order of said court, and, as directed by said court, the said certificate is by me forwarded to the Supreme Court of the United States for its action thereon.

In witness whereof I have hereunto subscribed my name and affixed the seal of said court, at the city of New York, this 1st day of July, A. D. 1913.

[SEAL.] WM. PARKIN,
Clerk of the United States Circuit Court of Appeals for the Second Circuit.

(Indorsed:) U. S. Circuit Court of Appeals for the Second Circuit. United States of America, plaintiff in error (plaintiff below), against Roy A. Rainey, defendant in error (defendant below), action No. 2. Certificate of question of law to Supreme Court. H. Snowden Marshall, United States attorney, attorney for United States. United States Circuit Court of Appeals, Second Circuit. Filed July 1, 1913. William Parkin, Clerk.

(Indorsement on cover:) File No. 23,779. U. S. Circuit Court Appeals, 2d Circuit. Term No. 628. The United States vs. Roy A. Rainey. (Certificate.) Filed July 2d, 1913. File No. 23,779.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1913.

No. 629.

THE UNITED STATES

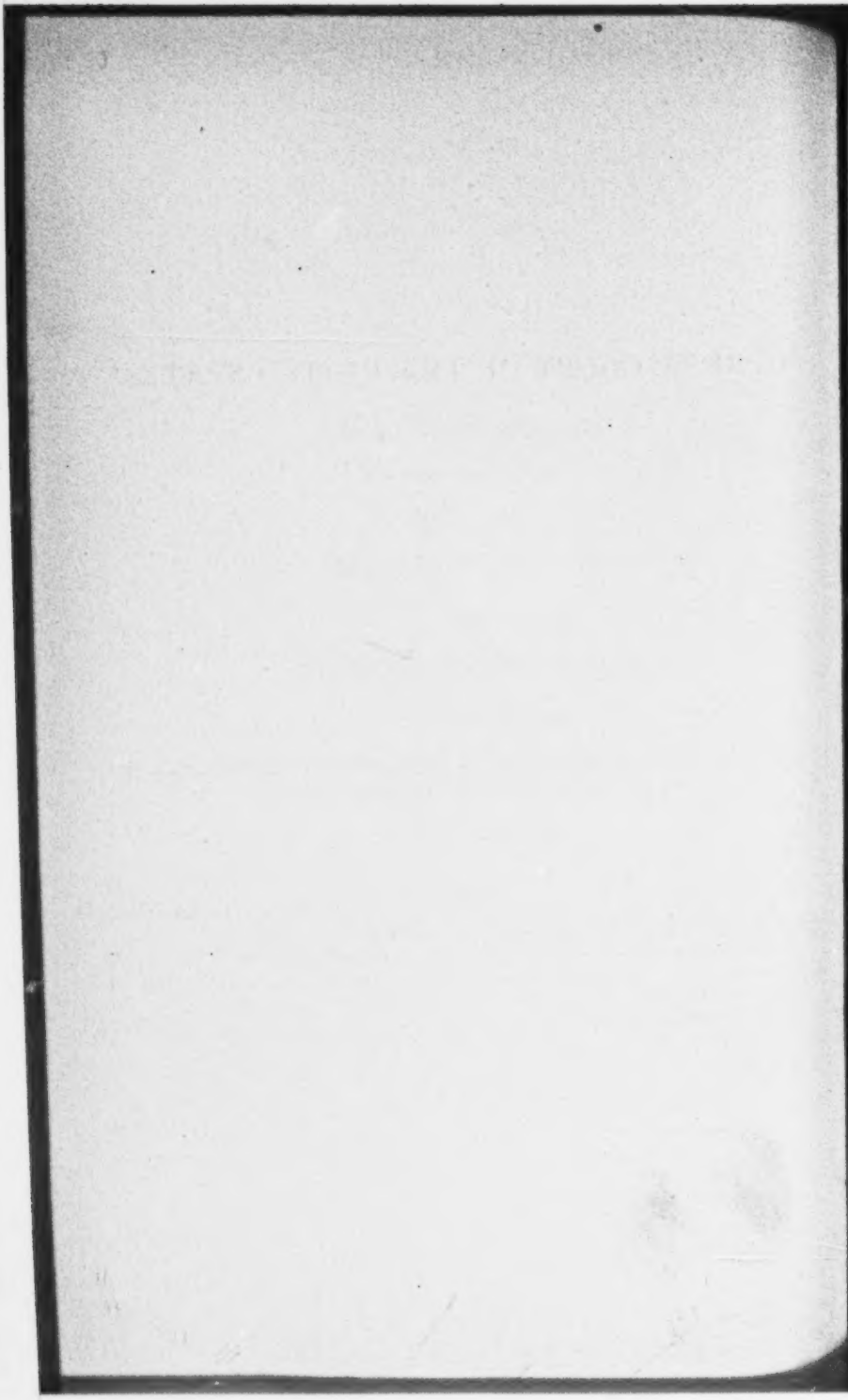
vs.

JAMES GORDON BENNETT.

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

INDEX.

	Original.	Print.
Certificate from the United States Circuit Court of Appeals for the Second Circuit	1	1
Statement	1	1
Questions certified	4	2
Judges' certificate	5	3
Clerk's certificate	6	3



1 United States Circuit Court of Appeals for the Second Circuit.

UNITED STATES OF AMERICA, PLAINTIFF IN ERROR (plaintiff below), *against* JAMES GORDON BENNETT, DEFENDANT IN ERROR (defendant below).	Action No. 1.

On writ of error to the United States Circuit Court for the Southern District of New York. Before Lacombe, Coxe, and Ward, circuit judges.

This cause having come on for argument before the court, after hearing Addison S. Pratt, Esq., assistant United States attorney for the Southern District of New York, on behalf of the plaintiff in error, and William D. Guthrie, Esq., on behalf of the defendant in error, it is, in view of the important questions arising upon the record herein, the doubt which the court entertains as to the correct decision thereof and the fact that similar questions are involved in other causes arising under section 37 of the act of Congress approved August 5, 1909, which are now pending in the Supreme Court of the United States,

Ordered that the statement and questions here following be certified to the Supreme Court of the United States for its instruction thereon, viz:

2 The United States, plaintiff below, sued out a writ of error to this court to review a judgment of the United States Circuit Court for the Southern District of New York in the above-entitled cause, entered on July 6, 1911, dismissing the amended complaint of the United States in an action brought against the defendant below to recover the tax imposed by section 37 of the tariff act of August 5, 1909 (ch. 6, 36 Stat., 112), for the year ended September 1, 1909, upon the use of the foreign-built yacht "Lysistrata," owned by the defendant.

On September 1, 1909, the collector of the port of New York made demand upon said defendant for the payment of a tax, purporting to be levied in and by section 37 of said act of Congress, equivalent to seven dollars ($7.00) per ton upon the gross tonnage of the foreign-built yacht owned by him, namely, the yacht "Lysistrata," of the tonnage of 1,942.75 tons, making a total tax of thirteen thousand six hundred and one dollars ($13,601). The defendant did not pay the tax nor compound it by paying the duty of thirty-five per centum ad valorem provided for in the said act of Congress, and thereupon this action was brought to recover such tax.

The amended complaint, after averring the sovereignty of the plaintiff and the American citizenship of the defendant, alleged that on September 1, 1909, the defendant was the managing owner of said yacht "Lysistrata"; that said yacht had been built in Great Britain; that she was not in fact, and was not intended to be, used for trade,

and that on that date the collector of customs at the port of New York, being the district nearest the residence of the defendant,
3 had fixed and determined and thereby levied the tonnage tax and had demanded payment thereof, but that no part had been paid nor had the defendant paid a duty of thirty-five per centum ad valorem upon said yacht in lieu of the tax.

By amended answer the defendant set up that said yacht "Lysistrata" was not registered, enrolled, or documented as a vessel of the United States; that such a yacht was not entitled to enjoy or exercise, and had never enjoyed or exercised, any rights, privileges, or protection as a vessel of the United States, and that since 1904 said yacht had not been within the jurisdiction of the United States, but had had a permanent situs within the jurisdiction of the Republic of France. The answer further alleged that at the time of the passage and approval of said act of Congress and of the levy of said tax upon the use of foreign-built yachts there were and ever since had been in the United States and within its jurisdiction a large number of yachts, pleasure boats, and vessels not used or intended to be used for trade, and not foreign built, which were then owned or chartered for more than six months by citizens of the United States, and which were similar to the said yacht of the defendant in all substantial respects as to construction, character, and nature of property, and identical with the defendant's yacht in all respects as to use and as being personal property of citizens of the United States, but upon which no tax was imposed by said act of Congress.

The United States demurred to the amended answer on the ground that it was insufficient in law and did not state facts sufficient to constitute a defense to the cause of action. The demurrer
4 was overruled. The United States electing not to plead over, but to stand on its demurrer, judgment was thereupon entered on July 6, 1911, in favor of the defendant, dismissing the amended complaint.

Upon the foregoing state of facts this court, in order that it may properly decide the questions of law involved, respectfully requests the instruction of the Supreme Court of the United States thereon, to wit:

I. Does the tax purporting to be imposed by section 37 of the act of Congress, approved August 5, 1909, apply to the use of a foreign-built yacht owned by a citizen of the United States, when such yacht, for a period of more than one year prior to September 1, 1909, and to the levy of such tax, was used wholly outside of the limits and territorial jurisdiction of the United States?

II. Did the tax purporting to be imposed by said act of Congress operate retrospectively, so as to be payable on September 1, 1909, in respect of the year then ended, or only prospectively, so as to become first due and payable on September 1, 1910?

III. Did the whole amount of the tax purporting to be imposed by said act of Congress become due and payable on September 1,

1909, or only such proportion thereof as the time during which the act was in force at that date bears to the whole year?

IV. Has Congress the power to levy a tax upon the use by a citizen of the United States of a yacht which is not actually and since the year 1904 was not at any time used within the territorial jurisdiction of the United States and which has its permanent situs in a foreign country?

V. Does said act of Congress, by purporting to impose a tax upon the use of foreign-built yachts alone, provide a valid tax, or a valid classification for purposes of taxation, within the power to lay and collect taxes delegated to Congress by the Constitution of the United States?

VI. Is the tax purporting to be imposed by said act of Congress in conflict with the requirement of due process of law contained in the fifth article of amendment to the Constitution of the United States?

VII. Is the United States entitled to recover interest upon the tax imposed upon the use of foreign-built yachts in and by section 37 of the tariff act of August 5, 1909?

It is further ordered that a copy of this certificate, under the seal of the court, be filed with the clerk of the Supreme Court of the United States at Washington, in the District of Columbia.

E. HENRY LACOMBE,
ALFRED C. COXE,
H. G. WARD,
Judges of the United States Circuit Court of Appeals for the Second Circuit, sitting in said cause.

United States Circuit Court of Appeals for the Second Circuit.

UNITED STATES OF AMERICA,
Second Judicial Circuit, ss:

I, William Parkin, clerk of the United States Circuit Court of Appeals for the Second Circuit, do hereby certify that the foregoing certificate and statement of facts in the case of United States of America against James Gordon Bennett, No. 1, was duly filed and entered of record in my office by order of said court, and as directed by said court, the said certificate is by me forwarded to the Supreme Court of the United States for its action thereon.

In witness whereof I have hereunto subscribed my name and affixed the seal of said court, at the city of New York, this 1st day of July, A. D. 1913.

[SEAL.]

WM. PARKIN,
Clerk of the United States Circuit Court of Appeals for the Second Circuit.

(Indorsed:) U. S. Circuit Court of Appeals for the Second Circuit. United States of America, plaintiff in error (plaintiff below),

against James Gordon Bennett, defendant in error (defendant below). Action No. 1. Certificate of questions of law to Supreme Court. H. Snowden Marshall, United States attorney, attorney for United States. United States Circuit Court of Appeals, Second Circuit. Filed July 1, 1913. William Parkin, clerk.

(Indorsement on cover:) File No. 23780, U. S. Circuit Court Appeals, 2d Circuit. Term No. 629. The United States *vs.* James Gordon Bennett. (Certificate.) Filed July 2d, 1913. File No. 23780.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1913.

No. 630.

THE UNITED STATES

vs.

JAMES GORDON BENNETT.

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

INDEX.

	Original.	Print.
Certificate from the United States Circuit Court of Appeals for the Second Circuit	1	1
Statement	1	1
Questions certified	6	4
Judges' certificate	8	5
Clerk's certificate	9	5

1 United States Circuit Court of Appeals for the Second Circuit.

UNITED STATES OF AMERICA, PLAINTIFF IN ERROR (plaintiff below), *against* JAMES GORDON BENNETT, DEFENDANT IN ERROR (defendant below).	Action No. 2.

On writ of error to the United States Circuit Court for the Southern District of New York. Before Lacombe, Coxe, and Ward, circuit judges.

This cause having come on for argument before the court, after hearing Addison S. Pratt, assistant United States attorney for the Southern District of New York, on behalf of the plaintiff in error, and William D. Guthrie, Esq., on behalf of the defendant in error, it is, in view of the important questions arising upon the record herein, the doubt which the court entertains as to the correct decision thereof and the fact that similar questions are involved in other causes arising under section 37 of the act of Congress approved August 5, 1909, which are now pending in the Supreme Court of the United States.

Ordered that the statement and questions here following be certified to the Supreme Court of the United States for its instruction thereon, viz:

2 The United States, plaintiff below, sued out a writ of error to this court to review a judgment of the United States Circuit Court for the Southern District of New York in the above-entitled cause, entered July 6, 1911, dismissing upon the merits the complaint of the United States in an action brought against the defendant below to recover the tax imposed by section 37 of the tariff act of August 5, 1909 (ch. 6, 36 Stat., 112), for the year ended September 1, 1910, upon the use of the foreign-built yacht "Lysistrata," owned by the defendant. The action was tried before the court without a jury, a jury having been expressly waived by stipulation in writing. The court made the following findings of fact:

"1. Defendant is a citizen of the United States and for some years past has been domiciled in and a resident of the Republic of France. On the 1st day of September, 1910, he was the owner and managing owner of the steam yacht 'Lysistrata.'

"2. The said steam yacht 'Lysistrata' was built in the Kingdom of Great Britain in the year 1901 and its gross tonnage on the said 1st day of September, 1910, was 1,942.75 tons. It had not been and was not on the said 1st day of September, 1910, used or intended to be used for trade.

"3. The defendant acquired title to the said steam yacht 'Lysistrata' on the 29th day of June, 1901, by a bill of sale from Archibald Denny, of Brachead, Dumbarton, Scotland, dated on the said day.

"4. On the 18th day of September, 1901, the defendant caused the said bill of sale to be recorded in the office of the collector of
3 customs of the port of New York, in Book 1 of Foreign-Built Vessels, page 110, and on the 18th day of September, 1901, the said collector endorsed on the said bill of sale a certificate in the following form, and thereafter returned the bill of sale to the defendant:

"'FORM OF CERTIFICATE ENDORSED ON BILL OF SALE OF FOREIGN-BUILT VESSELS PURCHASED BY A CITIZEN.

"'CUSTOM HOUSE,
"'*Port of New York:*

"'I, J. W. Johnson, deputy collector of customs for the port of New York, in the State of New York, in the United States of America, do hereby certify that the within bill of sale bearing date of June 29th, 1901, of the steam yacht "Lysistrata," of 626.39 tons registered tonnage, sold and transferred by Archibald Denny of Drachead, Dumbarton, Scotland, to James Gordon Bennett, of New York City, is, in form and substance, valid and effective in law, and has been duly recorded in this office; and that the said James Gordon Bennett is a citizen of the United States.

"'As witness my hand and seal of this office, this 18th day of September, in the year of our Lord one thousand nine hundred and one.

"'J. W. JOHNSON,
"'(SEAL.) *Deputy Collector.*'

"5. On the 13th day of November, 1899, Hon. Lyman J.
4 Gage, Secretary of the Treasury of the United States, established the following regulation for the information and guidance of officers of customs, which regulation continued in full force and effect to the 2nd day of January, 1908:

"'Art. 62. Any foreign-built vessel purchased by a citizen, although prohibited from being documented, is nevertheless entitled to legal protection as property of a citizen.

"'The collector may issue to any such vessel, owned by a citizen, a certificate in the prescribed form of the validity and filing of the bill of sale. A separate record will be kept of these vessels, and in the tonnage returns they will be reported in a separate column, under the head of "Foreign-built or undocumented vessels owned by citizens of the United States."

"6. On the 2nd day of January, 1908, Hon. George B. Cortelyou, Secretary of the Treasury of the United States, established the following regulation for the information and guidance of officers of the customs, which regulation has ever since been in full force and effect.

"'Art. 62. Certificate of protection. Any foreign-built ves-
5 sel purchased by a citizen, although prohibited from being documented, is nevertheless entitled to legal protection as property of a citizen.

"'The collector may issue to any such vessel owned by a citizen a certificate, in proper form, of the validity and filing of the bill of sale. A separate record will be kept of these vessels and in the tonnage returns they will be reported in a separate column under the head of "Foreign-built or undocumented vessels owned by citizens of the United States."'

"7. The said yacht has not been in the waters of or within the territorial jurisdiction of the United States since the year 1901, except for brief periods of a few days—less than a month—each in the years 1903, 1904, 1906, 1907, and 1908, when she was at Porto Rico, New York City, and Newport, Rhode Island; Miami, Florida, and Charlestown, South Carolina; Miami, Florida, and Manila, Philippine Islands, respectively. During these years, however, the defendant had used the said yacht each year on various cruises in foreign waters and on the high seas and on short trips in the Mediterranean Sea, such cruises and trips beginning and ending at the south of France. Her headquarters and usual anchorage or
5½ mooring place during these years, when not engaged on such cruises and trips, has been at Beaulieu, in the south of France.

"8. On or about the 1st day of September, 1910, the collector of customs at the port of New York levied a tax under section 37 of the tariff act of August 5th, 1909, of $7.00 per gross ton upon the use of the said yacht and gave notice to the defendant and demanded payment thereof. The amount of the said tax was the sum of $13,601.00 and has not been paid, nor has defendant paid a duty of 35 per cent ad valorem upon the said yacht in lieu of the said tax. The district of the said collector was not the district nearest the residence of the defendant.

"9. The said yacht has never been registered, enrolled, or documented as a vessel of the United States.

"10. At the time of the passage of the said tariff act of August 5th, 1909, and on the said 1st day of September, 1910, there were, and ever since have been, in the United States and within its jurisdiction a large number of yachts, pleasure boats, and vessels not used or intended to be used for trade, and not foreign built, which were then owned or chartered for more than six months by citizens of the United States, and which were and are similar to the defendant's said yacht in all substantial respects as to construction, character, and nature of property, and identical with the said yacht in all respects as to use and as being personal property of citizens of the United States, but upon the use of which property so similarly situated no tax is imposed by the said act of Congress and
6 that no such tax has in fact been imposed upon such yachts not foreign built."

For the purposes of this case only it was conceded by the parties that the district of the collector of customs of the port of New York was the district nearest the residence of the defendant.

Upon the foregoing state of facts this court, in order that it may properly decide the questions of law involved, respectfully requests

the instruction of the Supreme Court of the United States thereon, to wit:

I. Does the tax purporting to be imposed by section 37 of the act of Congress approved August 5, 1909, apply to the use of a foreign-built yacht owned by a citizen of the United States when such yacht for a period of more than two years prior to September 1, 1910, and to the levy of such tax, was used only in foreign waters or upon the high seas and wholly outside of the limits and territorial jurisdiction of the United States?

II. Does the tax purporting to be imposed by said act of Congress apply to the use of a foreign-built yacht owned by a citizen of the United States who was permanently resident and domiciled in a foreign country for more than two years prior to September 1, 1910, and to the levy of such tax?

III. Does the tax purporting to be imposed by said act of Congress apply to the use of a foreign-built yacht owned by a citizen of the United States who was permanently resident and domiciled in a foreign country for more than two years prior to September 1, 1910, and to the levy of such tax, when such yacht during said period was used only in foreign waters or upon the high seas and wholly
7 outside of the limits and territorial jurisdiction of the United States?

IV. Has Congress the power to levy a tax upon the use by a citizen of the United States of a yacht which is not actually, and since the year 1908 was not at any time, used within the territorial jurisdiction of the United States and which, when not engaged on cruises or trips, had her headquarters or usual anchorage or mooring place in a foreign country?

V. Had Congress the power to levy a tax upon the use by a citizen of the United States of a yacht which is not actually, and since the year 1908 was not at any time, used within the jurisdiction of the United States and which, when not engaged on cruises or trips, had her headquarters or usual anchorage or mooring place in a foreign country, when the owner has been and still is permanently resident and domiciled in a foreign country?

VI. Does said act of Congress, by purporting to impose a tax upon the use of foreign-built yachts alone, provide a valid tax or a valid classification for purposes of taxation within the power to lay and collect taxes delegated to Congress by the Constitution of the United States?

VII. Is the tax purporting to be imposed by said act of Congress in conflict with the requirement of due process of law contained in the fifth article of amendment to the Constitution of the United States?

VIII. Is the United States entitled to recover interest upon the tax imposed upon the use of foreign-built yachts in and by section 37 of the tariff act of August 5, 1909?

8 It is further ordered that a copy of this certificate, under the seal of the court, be filed with the clerk of the Supreme Court, at Washington, in the District of Columbia.

E. HENRY LACOMBE,
ALFRED C. COXE,
H. G. WARD,
Judges of the United States Circuit Court of Appeals for the Second Circuit, sitting in said cause.

9 United States Circuit Court of Appeals for the Second Circuit.

UNITED STATES OF AMERICA,
Second Judicial Circuit, ss:

I, William Parkin, clerk of the United States Circuit Court of Appeals for the Second Circuit, do hereby certify that the foregoing certificate and statement of facts in the case of United States of America against James Gordon Bennett, No. 2, was duly filed and entered of record in my office by order of said court, and as directed by said court the said certificate is by me forwarded to the Supreme Court of the United States for its action thereon.

In witness whereof I have hereunto subscribed my name and affixed the seal of said court, at the city of New York, this 1st day of July, A. D. 1913.

[SEAL.] WM. PARKIN,
Clerk of the United States Circuit Court of Appeals for the Second Circuit.

10 United States Circuit Court of Appeals, Second Circuit. Filed Jul. 1, 1913. William Parkin, clerk.

(Indorsed:) U. S. Circuit Court of Appeals for the Second Circuit. United States of America, plaintiff in error (plaintiff below), against James Gordon Bennett, defendant in error (defendant below). Action No. 2. Certificate of questions of law to Supreme Court. H. Snowden Marshall, United States attorney, attorney for United States. United States Circuit Court of Appeals, Second Circuit. Filed Jul. 1, 1913.

(Indorsement on cover:) File No. 23781. U. S. Circuit Court Appeals, 2d Circuit. Term No. 630. The United States vs. James Gordon Bennett. (Certificate.) Filed July 2d, 1913. File No. 23781.

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CERTIFICATE.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1915.

No. 631.

THE UNITED STATES

vs.

HARRIET GOELET.

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

FILED JULY 2, 1915.

(23782)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1913.

No. 631.

THE UNITED STATES

vs.

HARRIET GOELET.

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

INDEX.

	Original.	Print.
Certificate from the United States Circuit Court of Appeals for the Second Circuit	1	1
Statement	1	1
Questions certified	4	2
Judges' certificate	6	3
Clerk's certificate	7	4

1 United States Circuit Court of Appeals for the Second Circuit.

UNITED STATES OF AMERICA, PLAINTIFF IN ERROR (plaintiff below), *against* HARRIET GOELET, DEFENDANT IN ERROR (DEFENDANT below).	Action No. 1.

On writ or error to the United States Circuit Court for the Southern District of New York. Before Lacombe, Coxe, and Ward, circuit judges.

This cause having come on for argument before the court, after hearing Addison S. Pratt, esq., assistant United States attorney for the Southern District of New York, on behalf of the plaintiff in error, and William D. Guthrie, esq., on behalf of the defendant in error, it is, in view of the important questions arising upon the record herein, the doubt which the court entertains as to the correct decision thereof, and the fact that similar questions are involved in other causes arising under section 37 of the act of Congress, approved August 5, 1909, which are now pending in the Supreme Court of the United States.

Ordered that the statement and questions here following be certified to the Supreme Court of the United States for its instruction thereon, viz:

The United States, plaintiff below, sued out a writ of error to this court to review a judgment of the United States Circuit Court
2 for the Southern District of New York in the above-entitled cause, entered on July 6, 1911, dismissing the amended complaint of the United States in an action brought against the defendant below to recover the tax imposed by section 37 of the tariff act of August 5, 1909 (ch. 6, 36 Stat., 112), for the year ended September 1, 1909, upon the use of the foreign-built yacht "Nahma," owned by the defendant.

On September 1, 1909, the collector of the port of New York made demand upon said defendant for the payment of a tax, purporting to be levied in and by section 37 of said act of Congress, equivalent to seven dollars ($7.00) per ton upon the gross tonnage of the foreign-built yacht owned by her, namely, the yacht "Nahma," of the tonnage of 1,739.83 tons, making a total tax of twelve thousand one hundred and eighty dollars ($12,180). The defendant did not pay the tax nor compound it by paying the duty of thirty-five per centum ad valorem provided for in the said act of Congress, and thereupon this action was brought to recover such tax.

The amended complaint, after averring the sovereignty of the plaintiff and the American citizenship of the defendant, alleged that on September 1, 1909, the defendant was the managing owner of said yacht "Nahma"; that said yacht had been built in Great Britain; that she was not in fact, and was not intended to be, used for trade;

and that on that date the collector of customs at the port of New York, being the district nearest the residence of the defendant, had fixed and determined and thereby levied the tonnage tax, and had demanded payment thereof, but that no part had been paid nor
3 had the defendant paid a duty of thirty-five per centum ad valorem upon said yacht in lieu of the tax.

By amended answer the defendant set up that said yacht "Nahma" was not registered, enrolled, or documented as a vessel of the United States; that such a yacht was not entitled to enjoy or exercise, and had never enjoyed or exercised, any rights, privileges, or protection as a vessel of the United States; that the defendant was, on September 1, 1909, and for several years prior thereto had been permanently a resident of and domiciled at Paris, in the Republic of France; and that since 1901 her said yacht had not been within the jurisdiction of the United States, but had had a permanent situs within the jurisdiction of Great Britain. The answer further alleged that, at the time of the passage and approval of said act of Congress and of the levy of said tax upon the use of foreign-built yachts, there were and ever since had been in the United States and within its jurisdiction, a large number of yachts, pleasure boats, and vessels not used or intended to be used for trade, and not foreign built, which were then owned or chartered for more than six months by citizens of the United States, and which were similar to the said yacht of the defendant in all substantial respects as to construction, character, and nature of property, and identical with the defendant's yacht in all respects as to use and as being personal property of citizens of the United States, but upon which no tax was imposed by said act of Congress.

4 The United States demurred to the amended answer on the ground that it was insufficient in law and did not state facts sufficient to constitute a defense to the cause of action. The demurrer was overruled. The United States electing not to plead over but to stand on its demurrer, judgment was thereupon entered on July 6, 1911, in favor of the defendant, dismissing the amended complaint.

Upon the foregoing state of facts this court, in order that it may properly decide the questions of law involved, respectfully requests the instruction of the Supreme Court of the United States thereon, to wit:

I. Does the tax purporting to be imposed by section 37 of the act of Congress, approved August 5, 1909, apply to the use of a foreign-built yacht owned by a citizen of the United States, when such yacht, for a period of more than one year prior to September 1, 1909, and to the levy of such tax, was used wholly outside of the limits and territorial jurisdiction of the United States?

II. Does the tax purporting to be imposed by said act of Congress apply to the use of a foreign-built yacht owned by a citizen of the United States who was permanently resident and domiciled in a

foreign country for more than one year prior to September 1, 1909, and to the levy of such tax?

III. Does the tax purporting to be imposed by said act of Congress apply to the use of a foreign-built yacht owned by a citizen of the United States who was permanently resident and domiciled in a foreign country for more than one year prior to September 1, 1909, and to the levy of such tax, when such yacht during said period was used wholly outside of the limits and territorial jurisdiction of the United States?

IV. Did the tax purporting to be imposed by said act of Congress operate retrospectively, so as to be payable on September 1, 1909, in respect of the year then ended, or only prospectively, so as to become first due and payable on September 1, 1910?

V. Did the whole amount of the tax purporting to be imposed by said act of Congress become due and payable on September 1, 1909, or only such proportion thereof as the time during which the act was in force at that date bears to the whole year?

VI. Has Congress the power to levy a tax upon the use by a citizen of the United States of a yacht which is not actually, and since the year 1901 was not at any time, used within the territorial jurisdiction of the United States and which has its permanent situs in a foreign country?

VII. Had Congress the power to levy a tax upon the use by a citizen of the United States of a yacht which is not actually, and since the year 1901 was not at any time, used within the jurisdiction of the United States and which has its permanent situs in a foreign country, when the owner is permanently resident and domiciled in a foreign country?

VIII. Does said act of Congress, by purporting to impose a tax upon the use of foreign-built yachts alone, provide a valid tax, or a valid classification for purposes of taxation, within the power to lay and collect taxes delegated to Congress by the Constitution of the United States?

IX. Is the tax purporting to be imposed by said act of Congress in conflict with the requirement of due process of law contained in the fifth article of amendment to the Constitution of the United States?

X. Is the United States entitled to recover interest upon the tax imposed upon the use of foreign-built yachts in and by section 37 of the tariff act of August 5, 1909?

It is further ordered that a copy of this certificate, under the seal of the court, be filed with the clerk of the Supreme Court of the United States at Washington in the District of Columbia.

E. HENRY LACOMBE,
ALFRED C. COXE,
H. G. WARD,

Judges of the United States Circuit Court of Appeals for the Second Circuit sitting in said cause.

7 United States Circuit Court of Appeals for the Second Circuit.

UNITED STATES OF AMERICA,
Second Judicial Circuit, ss:

I, William Parkin, clerk of the United States Circuit Court of Appeals for the Second Circuit, do hereby certify that the foregoing certificate and statement of facts in the case of United States of America against Harriet Goelet, No. 1, was duly filed and entered of record in my office by order of said court, and as directed by said court, the said certificate is by me forwarded to the Supreme Court of the United States for its action thereon.

In witness whereof, I have hereunto subscribed my name and affixed the seal of said court, at the city of New York, this 1st day of July, A. D. 1913.

[SEAL.] WM. PARKIN,
Clerk of the United States Circuit Court of Appeals for the Second Circuit.

8 (Indorsed:) U. S. Circuit Court of Appeals for the Second Circuit. United States of America, plaintiff in error (plaintiff below), against Harriet Goelet, defendant in error (defendant below). Action No. 1. Certificate of questions of law to Supreme Court. H. Snowden Marshall, United States attorney, attorney for United States. United States Circuit Court of Appeals, Second Circuit. Filed July 1, 1913. William Parkin, clerk.

(Indorsement on cover:) File No. 23,782. U. S. Circuit Court Appeals, 2d Circuit. Term No. 631. The United States vs. Harriet Goelet. (Certificate.) Filed July 2d, 1913. File No. 23,782.

23

CERTIFICATE.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 19[illegible]3.

No. 63[illegible]

THE UNITED STATES

vs.

HARRIET GOELET.

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

FILED JULY 2, 1912.

(23783)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1913.

No. 632.

THE UNITED STATES

vs.

HARRIET GOELET.

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

INDEX.

	Original.	Print.
Certificate from the United States Circuit Court of Appeals for the Second Circuit	1	1
Statement	1	1
Questions certified	8	4
Judges' certificate	10	5
Clerk's certificate	11	5

1 United States Circuit Court of Appeals for the Second Circuit.

UNITED STATES OF AMERICA, PLAINTIFF IN ERROR (plaintiff below), *against* HARRIET GOELET, DEFENDANT IN ERROR (DEFENDANT below).	Action No. 2.

On writ of error to the United States Circuit Court for the Southern District of New York, before Lacombe, Coxe, and Ward, circuit judges.

This cause having come on for argument before the court, after hearing Addison S. Pratt, Esq., assistant United States attorney for the Southern District of New York, on behalf of the plaintiff in error, and William D. Guthrie, Esq., on behalf of the defendant in error, it is, in view of the important questions arising upon the record herein, the doubt which the court entertains as to the correct decision thereof and the fact that similar questions are involved in other causes arising under section 37 of the act of Congress approved August 5, 1909, which are now pending in the Supreme Court of the United States.

Ordered that the statement and questions here following be certified to the Supreme Court of the United States for its instruction thereon, viz:

2 The United States, plaintiff below, sued out a writ of error to this court to review a judgment of the United States Circuit Court for the Southern District of New York in the above-entitled cause, entered July 6, 1911, dismissing upon the merits the complaint of the United States in an action brought against the defendant below to recover the tax imposed by section 37 of the tariff act of August 5, 1909 (ch. 6, 36 Stat., 112), for the year ended September 1, 1910, upon the use of the foreign-built yacht "Nahma," owned by the defendant. The action was tried before the court without a jury, a jury having been expressly waived by stipulation in writing. The court made the following findings of fact:

"1. Defendant is a citizen of the United States, and since 1905 or 1906 has been domiciled in and a resident of the Republic of France. On the 1st day of September, 1910, she was the owner and managing owner of the steam yacht 'Nahma.'

"2. The said steam yacht 'Nahma' was built in the Kingdom of Great Britain in the year 1896, and its gross tonnage on the said 1st day of September, 1910, was 1,739.83 tons. It had not been, and was not on the said 1st day of September, 1910, used or intended to be used for trade.

"3. Robert Goelet, the husband of defendant, and a citizen of the United States, acquired title to the said steam yacht 'Nahma' on the 30th day of November, 1896, by a bill of sale from George

Lennox Watson, of Glasgow, Scotland, dated on the said day. On the 12th day of December, 1896, the said Robert Goelet caused
3 the said bill of sale to be recorded in the office of the collector of customs of the port of New York in Book 1 of Foreign-Built Vessels, page 77, and on the 28th day of October, 1897, he also caused the said bill of sale to be recorded in the office of the collector of customs of the port of Newport, Rhode Island, in Book 1 of Foreign-Built Vessels, pages 1 and 2.

"4. On the 22nd day of December, 1896, the collector of customs of the port of New York endorsed on the said bill of sale a certificate in the following form and thereafter returned the same to the said Robert Goelet:

"'FORM OF CERTIFICATE ENDORSED ON BILL OF SALE OF FOREIGN-BUILT VESSEL PURCHASED BY A CITIZEN.

"'CUSTOM HOUSE,
"'*Port of New York.*

"'I, J. W. Johnson, deputy collector of customs for the port of New York, in the State of New York, in the United States of America, do hereby certify that the within bill of sale bearing date of November 30th, 1896, of the steam yacht "Nahma" of 969.79 tons registered tonnage, sold and transferred by George Lennox Watson, of Glasgow, to Robert Geolet, of New York City, is, in form and substance, valid and effective in law, and has been duly recorded in this office, and that the said Robert Goelet is a citizen of the United States.

4 "'As witness my hand and the seal of this office, this 22nd day of December, in the year of our Lord one thousand eight hundred and ninety-six.

"'[SEAL.] J. W. JOHNSON,
"'*Deputy Collector.*'

"5. The said Robert Goelet died on April 27th, 1899, leaving a last will and testament, under the provisions of which he bequeathed the said yacht to the defendant, his wife. On September 12th, 1899, George G. De Witt, one of the duly qualified executors of the said last will and testament of Robert Geolet, executed and delivered a bill of sale of the said yacht to defendant and on December 16th, 1899, the defendant caused the said bill of sale to be recorded in the office of the collector of customs of the port of Newport, Rhode Island, in Book 1 of Foreign-Built Vessels, page 3.

"6. On the 2nd day of April, 1892, Hon. Charles Foster, Secretary of the Treasury of the United States, established the following regulation relating to commerce and navigation for the information and guidance of officers of customs, which regulation continued in full force and effect to the 13th day of November, 1899:

"'ART. 62. Any foreign-built vessel purchased by a citizen, although prohibited from being documented, is nevertheless entitled to legal protection as property of a citizen, provided she be recorded in

a district of the United States under the statute governing the recording of unregistered vessels.

5x "'The collector may issue to any such vessel owned by a citizen, a certificate of ownership in the prescribed form, and also of the validity and filing of the bill of sale. No such certificate, however, shall be granted unless the vessel is bound to a foreign port. A separate record will be kept of these vessels, and in the tonnage returns they will be reported in a separate column, under the head of "Foreign built or undocumented vessels owned by citizens of the United States."'

"7. On the 13th day of November, 1899, Hon. Lyman J. Gage, Secretary of the Treasury of the United States, established the following regulation for the information and guidance of officers of customs, which regulation continued in full force and effect to the 2nd day of January, 1908.

"'Art. 62. Any foreign-built vessel purchased by a citizen, although prohibited from being documented, is nevertheless entitled to legal protection as property of a citizen.

"'The collector may issue to any such vessel, owned by a citizen, a certificate in the prescribed form, of the validity and filing of the bill of sale. A separate record will be kept of these vessels, and in the tonnage returns they will be reported in a separate column, under the head of "Foreign built or undocumented vessels owned by citizens of the United States."'

6x "8. On the 2nd day of January, 1908, Hon. George B. Cortelyou, Secretary of the Treasury of the United States, established the following regulation for the information and guidance of officers of the customs, which regulation has ever since been in full force and effect:

"'Art. 62. Certificate of protection. Any foreign-built vessel purchased by a citizen, although prohibited from being documented, is nevertheless entitled to legal protection as property of a citizen.

"'The collector may issue to any such vessel, owned by a citizen, a certificate in proper form of the validity and filing of the bill of sale. A separate record will be kept of these vessels, and in the tonnage returns they will be reported in a separate column, under the head of "Foreign built or undocumented vessels owned by citizens of the United States."'

"9. The said steam yacht has not been in the waters nor within the territorial jurisdiction of the United States since the month of October, 1901. Since May 4th, 1899, the defendant had used the said yacht for from six to nine months in each year in voyaging from port to port in foreign countries and upon the high seas. When not in commission the said yacht has laid up each year, at Greenock, Scotland, and when not cruising has been kept at Greenock, Scotland.

"10. On or about the 1st day of September, 1910, the collector of customs at the port of New York levied a tax under section 37
7x of the tariff act of August 5th, 1909, of $7.00 per gross ton upon the use of the said yacht, and gave notice to the defend-

ant and demanded payment thereof. The amount of the said tax was the sum of $12,180.00 and has not been paid, nor has defendant paid a duty of 35 per cent ad valorem upon the said yacht in lieu of the said tax. The district of the said collector was not the district nearest the residence of the defendant.

"11. The said yacht has never been registered, enrolled, or documented as a vessel of the United States.

"12. At the time of the passage of the said tariff act of August 5th, 1909, and on the said 1st day of September, 1910, there were, and ever since have been in the United States and within its jurisdiction, a large number of yachts, pleasure boats, and vessels not used or intended to be used for trade, and not foreign built, which were then owned or chartered for more than six months by citizens of the United States, and which were and are similar to the defendant's said yacht in all substantial respects as to construction, character and nature of property, and identical with the said yacht in all respects as to use and as being personal property of citizens of the United States, but upon the use of which property so similarly situated no tax is imposed by the said act of Congress, and that no such tax has in fact been imposed upon such yachts not foreign built."

For the purposes of this case only, it was conceded by the parties that the district of the collector of customs of the port of
8x New York was the district nearest the residence of the defendant.

Upon the foregoing state of facts this court, in order that it may properly decide the questions of law involved, respectfully requests the instruction of the Supreme Court of the United States thereon, to wit:

I. Does the tax purporting to be imposed by section 37 of the act of Congress, approved August 5, 1909, apply to the use of a foreign-built yacht owned by a citizen of the United States when such yacht, for a period of more than two years prior to September 1, 1910, and to the levy of such tax, was used only in foreign waters, or upon the high seas, and wholly outside of the limits and territorial jurisdiction of the United States?

II. Does the tax purporting to be imposed by said act of Congress apply to the use of a foreign-built yacht owned by a citizen of the United States who was permanently resident and domiciled in a foreign country for more than two years prior to September 1, 1910, and to the levy of such tax?

III. Does the tax purporting to be imposed by said act of Congress apply to the use of a foreign-built yacht owned by a citizen of the United States who was permanently resident and domiciled in a foreign country for more than two years prior to September 1, 1910, and to the levy of such tax, when such yacht during said period was used only in foreign waters, or upon the high seas, and wholly outside of the limits and territorial jurisdiction of the United States?

9x IV. Has Congress the power to levy a tax upon the use by a citizen of the United States of a yacht which is not actually

and since the year 1901, was not at any time used within the territorial jurisdiction of the United States and which, when not in commission, has laid up each year in a foreign country, and when not cruising, has been kept in a foreign country?

V. Had Congress the power to levy a tax upon the use by a citizen of the United States of a yacht which is not actually, and since the year 1901, was not at any time used within the jurisdiction of the United States and which, when not in commission, has laid up each year in a foreign country, and when not cruising has been kept in a foreign country, when the owner has been, and still is, permanently resident and domiciled in a foreign country?

VI. Does said act of Congress, by purporting to impose a tax upon the use of foreign-built yachts alone, provide a valid tax, or a valid classification for purposes of taxation, within the power to lay and collect taxes delegated to Congress by the Constitution of the United States?

VII. Is the tax purporting to be imposed by said act of Congress in conflict with the requirement of due process of law contained in the fifth article of amendment to the Constitution of the United States?

VIII. Is the United States entitled to recover interest upon the tax imposed upon the use of foreign-built yachts in and by section 37 of the tariff act of August 5, 1909?

10 It is further ordered that a copy of this certificate, under the seal of the court, be filed with the clerk of the Supreme Court, at Washington, in the District of Columbia.

E. HENRY LACOMBE,
ALFRED C. COXE,
H. G. WARD,
Judges of the United States Circuit Court of Appeals for the Second Circuit, sitting in said cause.

11 United States Circuit Court of Appeals for the Second Circuit.

UNITED STATES OF AMERICA,
Second Judicial Circuit, ss:

I, William Parkin, clerk of the United States Circuit Court of Appeals for the Second Circuit, do hereby certify that the foregoing certificate and statement of facts in the case of United States of America against Harriet Goelet, No. 2, was duly filed and entered of record in my office by order of said court, and as directed by said court, the said certificate is by me forwarded to the Supreme Court of the United States for its action thereon.

In witness whereof, I have hereunto subscribed my name and affixed the seal of said court at the city of New York, this 1st day of July, A. D. 1913.

[SEAL.] WM. PARKIN,
Clerk of the United States Circuit Court of Appeals for the Second Circuit.

(Indorsed:) U. S. Circuit Court of Appeals for the Second Circuit. United States of America, plaintiff in error (plaintiff below), against Harriet Goelet, defendant in error (defendant below). Action No. 2. Certificate of questions of law to Supreme Court. H. Snowden Marshall, United States attorney, attorney for United States. United States Circuit Court of Appeals, Second Circuit. Filed Jul. 1, 1913. William Parkin, clerk.

(Indorsement on cover:) File No. 23,783. U. S. Circuit Court Appeals, 2d Circuit. Term No. 632. The United States *vs.* Harriet Goelet. (Certificate.) Filed July 2d, 1913. File No. 23,783.

24

Supreme Court, U. S.
FILED
JAN 6 1914
JAMES D. MAHER
CLERK

FOREIGN-BUILT YACHT TAX CASES.

United States Supreme Court.

OCTOBER TERM, 1913.

H. CLAY PIERCE, Plaintiff in-error,
v.
UNITED STATES OF AMERICA.
Nos. 64 and 65.

UNITED STATES OF AMERICA, Plaintiff-in-error,
v.
H. CLAY PIERCE.
Nos. 623 and 624.

CORNELIUS K. G. BILLINGS, Plaintiff-in-error,
v.
UNITED STATES OF AMERICA.
Nos. 66 and 67.

UNITED STATES OF AMERICA, Plaintiff-in error,
v.
CORNELIUS K. G. BILLINGS.
Nos. 625 and 626.

UNITED STATES OF AMERICA, Plaintiff-in-error,
v.
JAMES GORDON BENNETT.
Nos. 629 and 630.

UNITED STATES OF AMERICA, Plaintiff-in-error,
v.
HARRIET GOELET.
Nos. 631 and 632.

REPLY BRIEF ON BEHALF OF YACHT OWNERS

WILLIAM D. GUTHRIE,
Of counsel for Yacht Owners.

INDEX.

	PAGE
The statute requires actual use of the yachts	1
Congress did not intend to tax foreign-built yachts owned and used abroad by citizens domiciled abroad	7
Minor corrections of Government's brief	12
Congress has no power to tax the use of yachts permanently located and used abroad by citizens there domiciled	19
The classification made by the tax act violates the Fifth Amendment to the Constitution of the United States	21

List of Cases.

Alta, The, 148 Fed. 663	16, 17
Ayer & Lord Tie Co. *v.* Kentucky, 202 U. S. 409	15
Barron *v.* The Mayor and City Council of Baltimore, 7 Pet. 243	26
Dartmouth College *v.* Woodward, 4 Wheat. 518	28
Eidman *v.* Martinez, 184 U. S. 578	7, 8, 9, 10, 19
Flint *v.* Stone Tracy Co., 220 U. S. 108	4, 21, 24
French *v.* Barber Asphalt Paving Co., 181 U. S. 324	30
Hays *v.* Pacific Mail S. S. Co., 17 How. 596	15
Hylton *v.* United States, 3 Dall. 171	2, 3
Knowlton *v.* Moore, 178 U. S. 41	21, 22, 23, 27
Leloup *v.* Port of Mobile, 127 U. S. 640	27
Maxwell *v.* Dow, 176 U. S. 581	11
McCoach *v.* Minehill Ry. Co., 228 U. S. 295	5
McCray *v.* United States, 195 U. S. 27	21, 23
Merritt, The, 17 Wall. 582	16
Penna. Ry. Co. *v.* International Coal Co., 230 U. S. 184	12
Pollock *v.* Farmers Loan & Trust Co., 157 U. S. 429, 158 U. S. 601	1
Prout *v.* Starr, 188 U. S. 537	26
Sinking Fund Cases, 99 U. S. 700	30
Southern Pacific Co. *v.* Kentucky, 222 U. S. 63	15
Thomson *v.* The Advocate-General, 12 Cl. & Fin. 1	19
Twining *v.* New Jersey, 211 U. S. 78	30
United States *v.* Erie Ry. Co., 106 U. S. 327; 9 Ben. 67	19, 20
United States *v.* Freight Association, 166 U. S. 290	11
United States *v.* Whitridge, 231 U. S. 144	1
White's Bank *v.* Smith, 7 Wall. 646	16, 18
Wight *v.* Davidson, 181 U. S. 371	27
Zonne *v.* Minneapolis Syndicate, 220 U. S. 187	5

United States Supreme Court,

OCTOBER TERM, 1913.

H. CLAY PIERCE, Plaintiff-in-error,
v. Nos. 64 and 65.
UNITED STATES OF AMERICA.

UNITED STATES OF AMERICA, Plaintiff-in-error,
v. Nos. 623 and 624.
H. CLAY PIERCE.

CORNELIUS K. G. BILLINGS, Plaintiff-in-error,
v. Nos. 66 and 67.
UNITED STATES OF AMERICA.

UNITED STATES OF AMERICA, Plaintiff-in-error,
v. Nos. 625 and 626.
CORNELIUS K. G. BILLINGS.

UNITED STATES OF AMERICA, Plaintiff-in-error,
v. Nos. 629 and 630.
JAMES GORDON BENNETT.

UNITED STATES OF AMERICA, Plaintiff-in-error,
v. Nos. 631 and 632.
HARRIET GOELET.

REPLY BRIEF ON BEHALF OF YACHT OWNERS.

I.

As this court has again pointed out at this term in *United States* v. *Whitridge, Receiver*, 231 U. S. 144, 147, the act of Congress of August 5, 1909, was framed in view of the adjudications in *Pollock* v. *Farmers' Loan & Trust Co.*, 157 U. S. 429; 158 U. S. 601, and the intent of Congress undoubtedly was to avoid any question as to direct or indirect taxes. Reference to the reports of that case will show that there was a very serious difference of

opinion among the members of the court as to whether the decision then rendered did not in principle overrule the case of *Hylton* v. *United States*, 3 Dall. 171, which had held that a tax upon carriages was not a direct tax but an excise. The act of Congress of June 5, 1794, involved in the *Hylton* case (1 Stat. 373), levied a tax "upon all carriages for the conveyance of persons, which shall be kept by or for any person, for his or her own use, or to be let out to hire, or for the conveying of passengers." If the *Hylton* case was overruled, then a tax on carriages or on yachts kept for use would be a direct tax on such property and as such would be subject to the rule of apportionment. In order to avoid this supposedly doubtful question of constitutional law, Congress decided not to levy the new yacht tax on yachts or the ownership of yachts, as in the carriage taxes of 1794 and 1796, but solely upon the use of yachts. The Government now in substance urges the court to declare that both forms of taxation are essentially identical, and thereby to give the act of 1909 a force and effect which, it is submitted, the language of Congress does not warrant and which Congress did not intend.

It must be manifest that the attempt of Congress to differentiate the present tax from the carriage tax of 1794 led it into an inartificial and ambiguous enactment. An analysis of the present tax in connection with the act of June 5, 1794, will emphasize this point. The act of 1794 levied a tax upon carriages kept for use; but the act of August 5, 1909, does not levy a tax upon yachts kept for use but only upon the *use* of yachts. Apprehending [illegible] a direction to levy the tax upon the yacht itself or upon

the owner, as in the *Hylton* case, would be a direct tax, ownership was not made the test or occasion of liability, but the act of use was selected instead. There is nothing in the language employed by Congress in the act of 1909 to indicate that the use was to be by the owner or charterer, any more than there is in the case of import duties any requirement that importation shall be by the owner; for it is the act of importation or the act of use and not ownership which is taxed, and he who does the taxable act must pay the tax. The use of a foreign-built yacht may be by anybody provided only it be owned or chartered for six months by a citizen. The test of use selected by Congress, although impracticable in many aspects, cannot, however, be disregarded, and some other test substituted by the court.

The argument of the Government is in effect that although the tax levied by section 37 of the act of August 5, 1909 (36 Stat., c. 6, p. 112), is "upon the *use* of foreign built yachts," no *use* whatever need be shown and that *potential use* is all that is necessary, or, stated in equivalent words, that the right to use but not use is the test of liability to pay the tax. It is furthermore repeatedly urged in the Government's brief that the tax is upon "the present use" of a foreign-built yacht, and it is argued that present use on the first day of September of each year is the only practical test, and that the analogy of an annual property tax payable by the owner on a fixed date should be controlling. The inconvenience and impracticability of any other test is urged with force. But if we accept this view and concede that it was the intention of Congress to tax *use* as of and on the first of September, just as in the ordinary tax on real or personal property

the *ownership* as of and on a fixed day is taxed, irrespective of the duration of the ownership, then certainly there must be allegation and proof of *use* on that date in the one case just as there must be of ownership on the fixed date in the other case. The court cannot dispense with the requirement in either instance. It is because there is no suggestion of actual use on that date in the cases at bar that the Government is driven to insist upon its theory that Congress in employing the words "there shall be levied and collected . . . upon the use of every foreign-built yacht" did not mean or intend *use*, but instead meant and intended mere *possibility of use*, and that the statute should in effect be construed as if the words "the use of" had been omitted, and the statute read "there shall be levied and collected upon every foreign-built yacht," etc.

The same theory of potential, as distinguished from actual, doing of business has been repeatedly urged upon the court in connection with the Corporation Tax imposed by section 38 of the same act of Congress and as repeatedly overruled. It was then argued that the provision "carrying on or doing business by such corporation" did not require any action whatever by the corporation, but that it was sufficient if power to carry on or do business existed, or, as the idea is frequently expressed, was potential. This court, however, emphatically refused to adopt any such theory of interpretation or remodeling of a statute, and held that the language of Congress was plain and controlling. Hence, in *Flint* v. *Stone Tracy Co.*, 220 U. S. 108, 145, 150, Mr. Justice Day, speaking for the unanimous court, said:

"It is therefore apparent, giving all the words of

> the statute effect, that the tax is imposed not upon the franchises of the corporation irrespective of their use in business, nor upon the property of the corporation, but upon the doing of corporate or insurance business. . . .
>
> "The tax is not payable unless there be a carrying on or doing of business in the designated capacity, and this is made the occasion for the tax, measured by the standard prescribed."

The potential theory was even more distinctly urged upon the court in *Zonne* v. *Minneapolis Syndicate*, 220 U. S. 187, and there also it was overruled. It was again squarely presented in *McCoach* v. *Minehill Railway Co.*, 228 U. S. 295, 305, and Mr. Justice Pitney, speaking for the court, then said:

> "We cannot, however, agree with the contention made in behalf of the Government that because the Minehill Company retains its franchise of corporate existence, maintains its organization and holds itself ready to exercise its franchise of eminent domain, or other reserved powers, if and when required by the lessee, and ready to resume possession of the property at the expiration of the lease, it is therefore to be treated as doing business, in respect of the railroad, within the meaning of the Corporation Tax Law. As to these matters the case is governed by what was said by the court in *Flint* v. *Stone Tracy Co.*, 220 U. S. 145" (quoting the above language from the opinion in that case).

This reasoning of the court and these precedents should govern the interpretation of section 37 of the same act of Congress, and consequently *use* and not merely potential use must be shown before there can be any liability to pay the tax.

Should we indulge in speculations upon probabilities, it might very reasonably be assumed that Congress recognized the fairness of not taxing yacht owners who did not

use their yachts. Certainly, if fair and reasonable men were discussing such a tax, and had determined for any reason not to tax ownership or possession but to confine the tax to use, as the Corporation Tax was confined to the actual doing or carrying on of business in corporate capacity, it would readily occur to them that any yacht not used ought not to be taxed. And this would be particularly true if, as suggested by the Government, the underlying policy in their minds was to foster and encourage the use of American-built yachts. What could be more consistent than for the statute to provide that if yachtsmen owning foreign-built yachts did not use them but instead used domestic yachts, they should not be taxed? If the tax were payable when the foreign-built yacht was not actually used, this would tend to defeat the very purpose of Congress by removing all inducement to use American-built yachts.

The court will not fail to appreciate that much of the argument in support of the tax is based upon the assumption that the tax is equivalent to a tax on ownership; but to uphold any such construction the act of Congress must be remodeled and enforced in a manner which Congress did not see fit to provide and which it is probable it deliberately did not intend for fear of creating a direct tax. Remodeling legislation is not the business of the judicial department. If Congress has failed to express its intention in clear and unambiguous language, or if it was lead astray by an erroneous theory of constitutional law, or if it has provided an impracticable test, the remedy is by amendment of the enactment and not by judicial construction.

Therefore, it follows that at least in the Pierce cases, Nos. 64 and 65, there is no liability to pay the tax because the yacht *Yacona* was out of commission and not used at any time during the years 1909 and 1910.

II.

Assuming that use and not ownership is the test or occasion of liability to pay the tax in question, the next inquiry in the Goelet and Bennett cases is whether the use must not be within the waters or territorial jurisdiction of the United States. In other words, is there any language in the act indicating the intention of Congress to tax the use of yachts outside of the waters and territorial jurisdiction of the United States by American citizens domiciled in a foreign country? To require explicit language indicating such a novel and special exercise of the taxing power would be peculiarly fit and proper,[1] because whenever before in the history of Congress it has intended to tax or reach citizens domiciled abroad, it has expressed its intention to do so in clear and unmistakable terms, such as (*e. g.*, the acts of June 30, 1864, sec. 116, 13 Stat. 281; March 2, 1867, sec. 13, 14 Stat. 478; July 14, 1870, sec. 6, 16 Stat. 257; August 27, 1894, sec. 27, 28 Stat. 553) "any citizen of the United States residing abroad."

There is not a single word in the act of August 5, 1909, to support the contention that Congress had in mind yachts used outside of the waters and territorial jurisdiction of the United States by citizens domiciled abroad.

[1] *Eidman* v. *Martinez*, 184 U. S. 578, 583.

See principal brief at pp. 33–35. The Government states at p. 19 of its brief that the tax in question is "payable in terms by *every* citizen of the United States who owns a foreign-built yacht;" but that, as we have seen, is not the language of the statute. No citizen is taxed *eo nomine;* the tax is upon the use by some one not designated. The act does not say that the tax is levied upon every citizen who owns or charters a foreign-built yacht, and liability does not arise except on the part of some one who actually uses a foreign-built yacht owned or chartered by a citizen. The phrase "by any citizen or citizens of the United States" does not relate to or qualify the antecedent "use," but solely identifies and qualifies the foreign-built yacht. Hence, the words "by any citizen or citizens of the United States" do not indicate that Congress had in mind the use of yachts abroad by non-resident citizens.

The reasoning of the court in *Eidman* v. *Martinez*, 184 U. S. 578, with its review of the English and American cases, is most persuasive in support of the proposition that a general act of Congress levying a tax upon property or the use of property should be presumed to relate only to property or use within the territorial jurisdiction of the United States. The court said among other things (at pp. 586, 592):

> "From this analysis of the English cases it clearly appears that, under a general act imposing a duty upon legacies, the law of the domicil of the testator controls, and if he be domiciled abroad, whether an alien or a British subject, his legacies are exempt, whether the property be in England at the time of his death, or be subsequently remitted there by his executors for local administration and distribution. . . .
>
> "We decline to hold the tax involved in this case

> applicable to this estate because the words of the statute do not require it, and because the thing taxed, that is, the transmission of the property to the legatees or next of kin, takes place in a foreign country."

The analogy between a tax upon the transmission of property by will and upon the use of property is not at all strained for in each instance it is the act or transaction which is taxed and not the property itself. If an American citizen domiciled in France had died there leaving property in that country which passed by his will, there would have been no liability under *Eidman* v. *Martinez* for the duty on legacies imposed by the War Tax Law of June 13, 1898, c. 448, 30 Stat. 448, 464. The reason would be, in the language of that case, "because the words of the statute do not require it, and because the thing taxed, that is, the transmission of the property to the legatees or next of kin, takes place in a foreign country."

So likewise under the act of August 5, 1909, the use of a foreign-built yacht in a foreign country by an owner there domiciled is not within the reasonable intendment of the language used by Congress, which was presumably familiar with the *Eidman* case and the rules there enunciated. Those rules of interpretation apply to the present cases, and the court should similarly decline to hold the yacht tax applicable to use abroad, because the words of the statute do not require it, and because the thing taxed, that is, the use of yachts, takes place in a foreign country.

It is, however, urged by the Government (see p. 26 of its brief) that the language found in the act of August 5, 1909, was intentionally different from that used in the act of 1898 involved in *Eidman* v. *Martinez*, and it is suggested that the difference in language indicates a different intention on

the part of Congress as to persons residing abroad. But we submit that this by no means follows, particularly in view of the presumption that Congress was familiar with that case, and in view of the singular inappropriateness of the language to express an intention to tax citizens residing abroad. Surely no one attempting to differentiate the prior statute would have failed to use appropriate language. In the act of June 13, 1898, before the court in the *Eidman* case, Congress was referring to Internal Revenue Districts, which cover every part of the United States, and the language naturally was "the district of which the deceased person was a resident," whilst in the act of August 5, 1909, Congress was referring to customs districts, which do not cover the whole United States, and in such cases the natural and usual language was "the district nearest the residence of the owner." In fact, the difference in wording resulted from the customary form of expression in referring to vessels (see sec. 3, act of Dec. 31, 1792, 1 Stat. 287, 288; R. S. sec. 4141), and not at all from any idea of including non-resident citizens.

The brief of the Government states (p. 25) that as early as December 22, 1908, a Marine Supply Association submitted to some House Committee a list which included the yacht *Nahma*, and that the day before the adoption of the act Senator Lodge asked leave to have printed a list of yachts which would be affected by the new tax, and that "this list was headed by the *Lysistrata*, and included the *Nahma*." We have not investigated this line of argument because it is assumed that this court will not accept these documents as any evidence

whatever of the intent and meaning of an act of Congress. It would be going far afield to give force and effect to such statements in documents submitted to Congress, which, so far as appears, may not have been read or vouched for by a single legislator. At any rate, it would be going further than this court has ever gone before, if the mere fact that a Senator asked leave to have printed in the record a list of persons supposed to be affected by a tax, or that a Supply Association submitted a similar list seven months before the act was passed, were held to be the slightest competent evidence of the intention of Congress to tax any particular individual mentioned in such list. *United States* v. *Trans-Missouri Freight Ass'n*, 166 U. S. 290, 291, 316–319; *Maxwell* v. *Dow*, 176 U. S. 581, 601. Moreover, it does not appear that such lists disclosed the two essential facts (1) that the actual situs of these foreign-built yachts was in Europe and (2) that their owners had become permanently domiciled there. If these facts had been disclosed, Congress might have used appropriate language including or excluding such cases.

But assuming that such documents are admissible as competent evidence of the intention of Congress, it would then follow, as the logic of the argument, that Congress was urged to tax the non-resident owners of *Lysistrata* and *Nahma*, and that it omitted or declined to do so. According to settled rules of statutory construction, the omission of Congress under such circumstances to include non-resident owners in appropriate language is most significant and cannot be disregarded so as to give the statute the same effect as if Congress had declared its intention to adopt the suggestion and to tax the use of foreign-built

yachts in foreign waters by citizens domiciled abroad. *Penna. R. R. Co.* v. *International Coal Co.*, 230 U. S. 184, 198.

In connection with this point, that use must be shown within the territorial jurisdiction of the United States, the Government inquires how long a use is necessary—a day, or six months, or what? But, in considering the answer to such queries, it should be recalled that the preceding argument of the Government seeks to establish that use on the first day of September, the tax day, is the test of liability wholly irrespective of the duration of such use before or after. Under this rule, if a foreign-built yacht was in use on the first of September at any place within the territorial jurisdiction of Congress, there would be a liability; otherwise not. If it be said that this must lead to injustice and inequality and opportunity to circumvent the tax, the fault is with the selection of use on one day of the year as the date when the tax is to be levied irrespective of the duration of the use. The opportunity for transfer, however, presumably works no fraud upon the Government for the transferee in possession and using on September first must pay the tax, just as in the ordinary property tax the owner on the fixed day must pay the amount of any annual tax thereon although he may have owned the property for only a day.

III.

The brief of the Government (see pp. 23–24) suggests a doubt as to the facts before the court in regard to the actual situs of the yachts *Nahma* and *Lysistrata* owned by the defendants Goelet and Bennett respectively. Thus

it is stated that in the first action one of the questions certified indicates that the *Nahma* had acquired a situs abroad, and that in action No. 2 it was merely shown that the yacht had not been in the United States but had been used for cruises on the high seas and in foreign waters, and that when not in use was kept in Scotland. It is also stated at page 24, undoubtedly through inadvertent mistake, that "there is no suggestion that the *Lysistrata* . . . has acquired a foreign situs." It will, therefore, be necessary to call the attention of the court to what the records show in regard to the actual and legal situs of these yachts.

Action No. 1 against the defendant Goelet, the owner of the yacht *Nahma*, was tried on demurrer to the amended answer, in which among other things it was alleged that since 1901 the yacht had not been within the jurisdiction of the United States but had had a permanent situs within the jurisdiction of Great Britain. This specific allegation was admitted by the demurrer of the United States; the demurrer was overruled; the United States elected not to plead over but to stand on its demurrer, and the fact of situs thus alleged and admitted cannot now be challenged (certificate No. 631, fols. 3, 4).

In action No. 2, brought to recover the tax for 1910, the court found the facts proving the legal situs, namely, that the defendant Goelet since 1905 or 1906 had been domiciled in and a resident of the Republic of France; that the yacht *Nahma* had not been in the waters nor within the territorial jurisdiction of the United States since the month of October, 1901; that it had never been registered, enrolled, or documented as a vessel of the United States; that since May 4th, 1899, the defendant

had used the said yacht for from six to nine months in each year in voyaging from port to port in foreign countries and upon the high seas, and that when not in commission the yacht was laid up each year at Greenock, Scotland, and when not cruising had been kept at Greenock, Scotland (certificate No. 632, fols. 2, 6–7).

In action No. 1 against the defendant Bennett, the owner of the yacht *Lysistrata*, the amended answer alleged that since 1904 said yacht had not been within the jurisdiction of the United States, but had had a permanent situs within the jurisdiction of the Republic of France (No. 629, fol. 3). The United States demurred; its demurrer was overruled, and, having elected not to plead over but to stand on its demurrer, the fact of foreign situs cannot now be challenged (certificate No. 629, fols. 3, 4).

In action No. 2, the court found, as in the Goelet case, the facts proving the legal situs, namely, that the defendant Bennett for some years past had been domiciled in and a resident of the Republic of France; that the yacht *Lysistrata* had never been registered, enrolled, or documented as a vessel of the United States; that said yacht had not been in the waters of or within the territorial jurisdiction of the United States during the year 1909, and that her headquarters and usual anchorage or mooring place since 1901, when not engaged on cruises and trips, had been at Beaulieu in the south of France (certificate No. 630, fols. 2, 5, 5½).

It is, therefore, apparent that as matter of fact the actual situs of these vessels was conclusively shown to have been abroad. But even if it could be said that the fact of actual situs was not shown, then the settled general

rule of law is that the domicil of the owner, in the absence of contrary proof, determines the situs of a vessel. Thus in *Ayer & Lord Tie Co.* v. *Kentucky*, 202 U. S. 409, 421, the court said:

> "The general rule has long been settled as to vessels plying between the ports of different States, engaged in the coastwise trade, that the domicil of the owner is the situs of a vessel for the purpose of taxation, wholly irrespective of the place of enrollment, subject, however, to the exception that where a vessel engaged in interstate commerce has acquired an actual situs in a State other than the place of the domicil of the owner, it may there be taxed because within the jurisdiction of the taxing authority."

See also *Southern Pacific Company* v. *Kentucky*, 222 U. S. 63, where the court reiterated the rule of law that the domicil of the owner ordinarily determines the situs of a vessel which has not acquired a separate situs elsewhere.

It is true that in the former case, the court, in stating the rule, used the expression "vessels plying between the ports of different States," but it was not intended thereby to intimate that a different rule would apply to vessels plying between foreign ports or between domestic and foreign ports. On the contrary, the court cited with approval *Hays* v. *Pacific Mail S. S. Co.*, 17 How. 596, in which the rule that the domicil of the owner fixes the situs of vessels was applied to vessels plying between New York or San Francisco and Panama.

It is further asserted in the Government's brief (p. 49) that the protection given by the United States to foreign-built yachts owned by non-resident citizens is as great as if they were entitled to registry or enrollment. It is submitted that the contrary is the fact. The per-

tinent acts of Congress do not give such a yacht any right, privilege, or protection whatever as a vessel of the United States. For all legal purposes, foreign-built yachts owned by Americans are regarded as foreign vessels and, as such, are entitled to no other rights or protection than appertain to other personal property of American citizens. Such a foreign-built yacht, even when owned by a resident citizen, is not and cannot become a vessel of the United States. Secs. 4131, 4132, 4311, 4312, R. S.; *White's Bank* v. *Smith*, 7 Wall. 646, 656; *The Merritt*, 17 Wall. 582, 585; *The Alta*, 148 Fed. 663, 665. The only exception is where such a vessel after a wreck has been purchased and repaired by a citizen in a certain manner and under certain circumstances and conditions. Sec. 4136, R. S. In every other case, American nationality is denied to foreign-built yachts although owned by American citizens. In *White's Bank* v. *Smith*, 7 Wall. 646, 655, 656, Mr. Justice Nelson spoke of such vessels as follows:

> "Ships or vessels of the United States are the creations of the legislation of Congress. None can be denominated such, or be entitled to the benefits or privileges thereof, except those registered or enrolled. . . . Ships or vessels not brought within these provisions of the acts of Congress, and not entitled to the benefits and privileges thereunto belonging, are of no more value as American vessels than the wood and iron out of which they are constructed."

As foreign-built yachts owned by American citizens are not documented (18 Op. Atty.-Gen. 234; Custom Regulations, arts. 1, 5, 62), they are not entitled to carry "marine documents," which consist of "certificates of registry, enrollments, and licenses, and, in addition to these, sea-letters and passports for vessels in time of war, [which are]

issued through collectors, on application, to registered vessels engaged in the foreign trade by sea, as an additional protection and evidence of nationality" (Cus. Reg., art. 14). Foreign-built yachts on entering our ports from abroad, are required to pay the tonnage dues to which all other foreign vessels are subject, but from which American yachts are exempt. Sec. 4219, R. S.; *The Alta*, 148 Fed. 663; Act of May 28, 1908, c. 212, s. 5, as amended by sec. 37 of Tariff Act of 1909. They are expressly forbidden to carry the American yacht ensign (secs. 4214, 4215, R. S.; Cus. Reg., arts. 44, 46), and they are denied the right and privilege enjoyed by American-built yachts of proceeding from port to port or to foreign ports without clearing.

Manifestly, the clear intention and effect of long-continued federal legislation is to impress upon a foreign-built yacht a foreign status for practically all purposes notwithstanding its ownership by a citizen. A foreign-built yacht has no rights anywhere as a vessel of the United States, whether in domestic or foreign waters or on the high seas. When abroad in foreign waters, it has no other right to protection than that which its owner may claim for any article of tangible personal property having a foreign situs, such, for example, as a foreign-built automobile or carriage kept and used abroad by an American citizen. The protection then extended is not that afforded by the Federal Government to persons or property under its own jurisdiction, but arises only out of international comity and the reciprocal international right to have the person or property of an American citizen duly protected *by the foreign state* within which he or his property happens to be. Foreign-

built yachts being treated and classified by Congress as foreign vessels, they are subject to all the disabilities and burdens of foreign vessels and are deprived of every right that attaches to a vessel because of its American nationality. In other words, the Federal Government accords to a foreign-built yacht owned by an American citizen no other privileges than it accords to a foreign vessel.

As we have already seen in the principal brief, the declaration of the Treasury Department that foreign-built yachts belonging to American citizens are entitled to protection as their property, cannot convert foreign-built yachts into American vessels, and it means no more and has no other legal effect than if the Department of State were to issue an order to the United States consuls abroad that American citizens owning and using any real or personal property in foreign lands are entitled to have such property protected by the foreign government under whose jurisdiction such property is. *White's Bank* v. *Smith*, 7 Wall. 646, 655, 656. Such an order, however, would not support a tax upon real or personal property in the foreign country, or alter the fact that such property is not under the direct protection of the United States Government, but is under the protection of the laws of the country where it is located and subject to full taxation and regulation there. Is not this the attitude of our Government today in respect of property of American citizens in Mexico?

It is, therefore, submitted that the use in foreign waters of their respective yachts by the defendants Goelet and Bennett, which use is subject to taxation at their domicil, should not be held likewise subject to taxation by

the United States Government in the absence of plain and unmistakable language indicating such an intent on the part of Congress. *Thomson* v. *The Advocate-General*, 12 Cl. & Fin. 1, cited and discussed with approval in *Eidman* v. *Martinez*, 184 U. S. 578, 585.

IV.

The court has never had occasion to adjudicate whether the power is vested in Congress to lay a tax upon citizens domiciled abroad in respect of the ownership or use of property real or personal having its situs in a foreign country. The question presented and decided in *United States* v. *Erie Ry. Co.*, 106 U. S. 327, related solely to non-resident aliens. However, in that case Mr. Justice Field, dissenting, used the following language (p. 332):

> "Where is the authority for this tax? It was said by counsel on the argument of the case—somewhat facetiously, I thought at the time—that Congress might impose a tax upon property anywhere in the world, and this court could not question the validity of the law, though the collection of the tax might be impossible, unless, perchance, the owner of the property should at some time visit this country or have means in it which could be reached. This court will, of course, never, in terms, announce or accept any such doctrine as this. . . .
>
> "There are limitations upon the powers of all governments, without any express designation of them in their organic law; limitations which inhere in their very nature and structure, and this is one of them,—that no rightful authority can be exercised by them over alien subjects, or citizens resident abroad or over their property there situated. This doctrine may

> be said to be axiomatic, and courts in England have felt it so obligatory upon them, that where general terms, used in acts of parliament, seem to contravene it, they have narrowed the construction to avoid that conclusion."

The learned justice quoted the following language of Chief Justice Waite on the same point:

> "The power of the United States to tax is limited to persons, property, and business within their jurisdiction, as much as that of a State is limited to the same subjects within its jurisdiction. *State Tax on Foreign-Held Bonds*, 15 Wall, 300."

And in the same case Mr. Justice Blatchford as District Judge had used the following language (9 Ben. 67, 73; 25 Fed. Cas. No. 15056):

> "The Congress of the United States can have no greater power to tax persons or property not within the jurisdiction of the United States, than a State has to tax persons and property not within its jurisdiction."

These are indeed dicta; but they show that the existence of the taxing power now contended by the Government to be vested in Congress is by no means clear, and that in the minds of these jurists there was serious doubt as to whether property or the use of property located in other countries and owned by persons there permanently domiciled could be taxed by Congress.

The reasoning of this court in the many cases involving state laws cited and discussed under point III of the principal brief (p. 25 *et seq.*) seems to support the general proposition that property or the use of property having a permanent situs abroad and owned and used by citizens domiciled abroad is not within the jurisdiction of Congress and cannot be taxed by it.

It is not deemed necessary to discuss now the validity of an income tax with respect to American citizens residing abroad. Income taxes have a character quite their own and present different aspects and different considerations. But it has yet to be held that Congress can tax a citizen domiciled in a foreign country upon income derived wholly from property in that foreign country and there used, or from business there carried on by such a citizen. However, in this, as in all other cases relating to the complex problems of taxation, it is always safer to confine the discussion to the tax actually in litigation, and in the cases of the defendants Goelet and Bennett, the tax is an excise upon the use of personal property having its permanent situs in another country and there used by a citizen permanently domiciled there.

V.

The Government in effect asserts in its brief that as the tax in question is concededly an excise and is geographically uniform throughout the United States, it could not amount to a deprivation of property without due process of law even if in its operation it were found to be intrinsically unequal or discriminatory. Three cases are cited as establishing this doctrine, viz., *Knowlton* v. *Moore*, 178 U. S. 41; *McCray* v. *United States*, 195 U. S. 27, and *Flint* v. *Stone Tracy Co.*, 220 U. S. 108. From these cases, the conclusion is drawn that there is no limitation whatever on the power of Congress to lay and collect duties, imposts

and excises other than that they shall be geographically uniform throughout the United States, and that excises may be laid by Congress which are unequal and even arbitrary and discriminatory among members of the same class of taxpayers under like conditions. We venture to challenge the correctness of these conclusions, and to assert that the cases cited do not so decide, and that the due process of law clause of the Fifth Amendment does limit the power of Congress to tax as it limits every other legislative power delegated to Congress by the Constitution. None of these cases involved any statute which, as authoritatively construed by this court, discriminated among members of the same class of taxpayers under identical conditions. In each case every member of the class taxed was treated exactly alike; the same tests and the same conditions applied to each, and there was no substantial inequality or discrimination as among those similarly situated.

Thus, in the *Knowlton* case, it was argued that members of the same class were upon a certain possible construction of the statute discriminated against, but this court refused to adopt such construction; and, whilst it is true that language was used in discussing the question which seems to indicate that the power of Congress to lay excise taxes was considered to be unrestrained and unlimited, the court was not called upon to rule whether there could be discrimination among the members of the same class of taxpayers under identical conditions. A requirement of uniformity or intrinsic equality as contended for in that case would prevent progression in the

rate of inheritance taxes and require proportionate levies. A tax may be thus lacking in intrinsic uniformity or equality which nevertheless applies without discrimination to all similarly situated. A progressive tax, such as, for example, the new income tax of 1913, is not a proportionate tax or burden, and in that sense is unequal; but it by no means follows that it is lacking in the requirement of due process of law in view of the fact that it applies impartially to all under like conditions of income. Certainly there is nothing in the *Knowlton* case to warrant the conclusion that Congress could have discriminated among those inheriting like property of like value under identical conditions, or could have separated the class of beneficiaries so as to exempt inheritances from native-born citizens and tax inheritances from foreign-born citizens, thus carrying the doctrine of classification according to origin to an absurd and unjust length.

In the *McCray* case, the court emphatically refused to adopt the argument of the contestants of the tax that colored oleomargarine and butter were substantially the same article, and it was conclusively shown, in refutation of that argument, that there was a marked difference and distinction between oleomargarine and butter, not only as a matter of common knowledge, but as recognized in the legislation of Congress and of a majority of the states, and their separation and classification as different articles for taxing purposes was therefore upheld. The language of the court shows that it did not intend to adjudge that members of the same class of taxpayers or owners or users of the same property could be discriminated against by Congress, or that a tax could be levied which

fell upon some of a class of taxpayers and not upon others similarly situated under identical conditions. As Mr. Justice White then said, at p. 61:

> "Conceding merely for the sake of argument that the due process clause of the Fifth Amendment, would avoid an exertion of the taxing power which, without any basis for classification, arbitrarily taxed one article and excluded an article of the same class, such concession would be wholly inapposite to the case in hand."

The *Flint* case, involving the Corporation Tax Law, presented the question whether corporations could be set apart and taxed as a class separate and distinct from individuals. The court refused to approve the extreme contention of the contestants that corporations and individuals belonged to the same class and in taxation must be grouped together, or that carrying on business in corporate capacity created no difference whatever, a proposition long since overthrown and no longer open to discussion in state or federal courts.

In the principal cases now before the court, it appears conclusively, either by the averment of the answers of the respective defendants admitted by the demurrer of the United States, or by a finding of fact, as follows, *e. g.*, No. 630, p. 3:

> "At the time of the passage of the said tariff act of August 5th, 1909, and on the said 1st day of September, 1910, there were, and ever since have been, in the United States and within its jurisdiction a large number of yachts, pleasure boats, and vessels not used or intended to be used for trade, and not foreign-built, which were then owned or chartered for more than six months by citizens of the United States, and which were and are similar to the defendant's said yacht in all substantial respects as

to construction, character, and nature of property, and identical with the said yacht in all respects as to use and as being personal property of citizens of the United States, but upon the use of which property so similarly situated no tax is imposed by the said act of Congress and that no such tax has in fact been imposed upon such yachts not foreign-built."

No case has yet presented to this court quite so distinctly the question whether Congress may discriminate among members of the same class of taxpayers under identical conditions, and the decision of the point now becomes necessary, unless, of course, it be held that for the purpose of taxing use yachts may be classified according to origin.

The attention of the court is, therefore, most earnestly directed to the proposition contended for by the contestants of this tax that the power of taxation delegated to Congress by the Constitution is subject to the limitation and restraint embodied in the requirement of due process of law, and that there is no warrant for the contention that the people of the United States in adopting the Fifth Amendment did not intend thereby to place any restraint upon the exercise or abuse of the taxing power.

An examination of the debates in the various conventions to which the Constitution of the United States was submitted for ratification and of the writings of that time will show that the subject of federal taxation and the danger of oppression from its exercise were discussed as much as any other feature, and that some of the states apprehended particular injury from the power to levy excises on commodities. It is well known and this court has recognized that the consent of the people

to the adoption of the Constitution in the necessary number of states was secured only upon the pledge that amendments protecting the individual against the abuse of the powers granted to the Federal Government would be forthwith submitted. *Barron* v. *The Mayor and City Council of Baltimore*, 7 Pet. 243, 250. In pursuance of this pledge, the First Congress (1 Stat. 97; Rev. Stat. p. 28, note) proposed the first ten articles of amendment to the Constitution, "in order," as recited in the preamble of the resolution, "to prevent misconstruction or abuse of its powers" and for the purpose of adding "declaratory and restrictive clauses." Of these restrictive clauses, the Fifth Article provides that "no person shall . . . be deprived of life, liberty or property, without due process of law." These ten amendments are to be regarded as of equal force and validity with the provisions of the Conttitution itself. Mr. Justice Shiras, speaking for the court in the case of *Prout* v. *Starr*, 188 U. S. 537, 543, 544, said:

> "The Constitution of the United States, with the several amendments thereof, must be regarded as one instrument, all of whose provisions are to be deemed of equal validity. . . .
>
> "It is one of the important functions of this court to so interpret the various provisions and limitations contained in the organic law of the Union that each and all of them shall be respected and observed."

Whether the Fifth Amendment imposes any restraint upon the taxing power of Congress has never yet been expressly adjudged; but no case has absolutely required such an adjudication. The wise rule of our system of jurisprudence which confines adjudications by the courts to actual cases as they arise from time to time, has made the growth of American constitutional law extremely slow,

and, therefore, novel exercises of governmental power frequently require re-examination and renewed exposition of fundamental principles in regard to the powers delegated by the Constitution to the Federal Government.[1] Indeed, it was not for more than a century and until the case of *Knowlton* v. *Moore*, 178 U. S. 41, 92, that the true meaning of the provision "uniform throughout the United States" was definitely settled to be geographical uniformity. In the later case of *Wight* v. *Davidson*, 181 U. S. 371, 377, the opinion of the court, in referring to a federal statute, declared that "the constitutional right against unjust taxation is given for the protection of private property," but it did not discuss what provision of the Constitution secured that right, although plainly the Fifth Amendment must have been in mind.

It is not necessary to show that, when the provision requiring "due process of law" contained in the Fifth Amendment was adopted by the people of the United States, it was understood that it would protect the individual against arbitrary or discriminating taxation. The provision may or may not have been assumed to apply to taxation as well as to all other powers in the exercise or abuse of which the rights of the individual might come in conflict with the powers of the new Federal Government. But the same thing has often been said of the circumstances surrounding the adoption of the Fourteenth Amendment after the close of the Civil War, and yet it is now established beyond question that the requirement of "due process of law" in that amendment clearly applies to the taxing power of the states.

---

[1] *Leloup* v. *Port of Mobile*, 127 U. S. 640, 648.

But there is no principle of constitutional construction which would permit us to say that because the question of arbitrary or discriminatory taxes was not shown to have been in the minds of those who framed and adopted the Fifth Amendment "in order to prevent misconstruction or abuse of its powers" by the Federal Government, it should not be applied to an abuse of the taxing power as well as of any other governmental power. The taxing power was the most important and far-reaching of the powers conferred; it was the one whose absence above all others had rendered government under the Articles of Confederation impotent and imbecile; it was the one most liable to abuse; it was the one around which waged the contest for ratification of the Constitution, and it was the one which of all powers could most readily be employed against one class of individuals and in favor of another, or to discriminate among members of the same class, if there were no limitation upon its exercise.

Even if it could be shown that the abuse of the taxing power was not in the minds of the people of the United States at the time the Fifth Amendment was adopted and that the framers perceived and apprehended no danger from the abuse of that power, this fact would not limit the scope of the amendment if the case now presented came fairly within its spirit and letter. As was said by Chief Justice Marshall in *Dartmouth College* v. *Woodward*, 4 Wheat. 518, 644:

> "It is more than possible that the preservation of rights of this description was not particularly in the view of the framers of the constitution, when the clause under consideration was introduced into that

instrument. It is probable that interferences of more frequent recurrence, to which the temptation was stronger, and of which the mischief was more extensive, constituted the great motive for imposing this restriction on the state legislatures. But although a particular and a rare case may not, in itself, be of sufficient magnitude to induce a rule, yet it must be governed by the rule, when established, unless some plain and strong reason for excluding it can be given. It is not enough to say that this particular case was not in the mind of the Convention, when the article was framed, nor of the American people, when it was adopted. It is necessary to go further, and to say that, had this particular case been suggested, the language would have been so varied as to exclude it, or it would have been made a special exception. The case being within the words of the rule must be within its operation likewise, unless there be something in the literal construction so obviously absurd or mischievous, or repugnant to the general spirit of the instrument, as to justify those who expound the constitution in making it an exception."

Applying this doctrine to the federal taxing power, we may say that there is no reasonable ground which would justify the conclusion that if the abuse of the taxing power by means of unequal and discriminating tax laws had been in the minds of the framers of the Fifth Amendment, they would have varied its language. Indeed, had the First Congress deliberated at length upon the choice of a provision which would be most effective to prevent an abuse of the taxing power, it could not have selected one more appropriate than "due process of law," or have used language which it was more natural for them to use for that purpose. The phrase "due process of law" or its equivalent "the law of the land" antedated the estab-

lishment of our political institutions, and was endeared to our fathers by antiquity and tradition, as well as by the noblest historical associations. It embodied then, as now, the most fundamental and far-reaching maxim of constitutional law, and represented the broadest and most comprehensive guaranty of personal and property rights. In fact, there are no words in our language which signify or mean more in respect of the rights and liberties of the individual.

It is true that the cases in this court which have applied to taxation the constitutional requirement of "due process of law" all arose under the Fourteenth Amendment and related to state laws; but no reason has been suggested why the very same provision in the Federal Constitution should have one meaning when applied to the state governments and to a state tax law and a narrower meaning and more limited scope when applied to the Federal Government. *Sinking-Fund Cases,* 99 U. S. 700, 718. Logically, if there should be in reason any difference, it should exist against the Federal Government, which is indisputably one of limited and enumerated powers. Cooley on Taxation, p. 12. The only sound principle must be that the provision is the same in both cases as applied to the taxing power (Mr. Justice Harlan dissenting in *French* v. *Barber Asphalt Paving Co.,* 181 U. S. 324, 355). In *Twining* v. *New Jersey,* 211 U. S. 78, 100-101, Mr. Justice Moody, discussing the "due process of law" provision in the Fifth Amendment, said:

> "If any different meaning of the same words, as they are used in the Fourteenth Amendment, can be conceived, none has yet appeared in judicial decision."

CONCLUSION.

It is submitted that the judgments in cases Nos. 64 to 67 should be reversed; that the question relating to interest certified in cases Nos. 623-632 should be answered in the negative; that in case No. 629 questions I, IV and V should be answered in the negative, question VI in the affirmative, the first clause of questions II and III in the negative, the second clause of question II in the affirmative, and the second clause of question III in the affirmative, if the first clause of question II is answered in the affirmative; that in case No. 630 questions I to VI should be answered in the negative and question VII in the affirmative; that in case No. 631 questions I, II, III, VI, VII and VIII should be answered in the negative and question IX in the affirmative, the first clause of questions IV and V in the negative, the second clause of question IV in the affirmative and the second clause of question V in the affirmative, if the first clause of question IV is answered in the affirmative; and that in case No. 632 question VII should be answered in the affirmative and the remaining questions in the negative.

Washington, D. C., January 5, 1914.

WILLIAM D. GUTHRIE,
Of counsel for Yacht-Owners.

25

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United States Supreme Court

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Nos. 631 and 632.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK AND CERTIFICATES FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF ON BEHALF OF OWNERS OF FOREIGN-BUILT YACHTS.

WILLIAM D. GUTHRIE,
Of counsel.

INDEX.

	PAGE
Statement	1
Assignment of errors	7
The classification in section 37 violates the fifth amendment to the Constitution of the United States	8
The act of Congress requires use of a foreign-built yacht during the taxable period	20
Tax is not leviable in respect of foreign-built yachts not within the jurisdiction of the United States	25
Section 37 should not be construed as retrospective so as to tax the use of foreign-built yachts during the year 1909	36
The Government is not entitled to recover interest	44
Conclusion	59

LIST OF CASES.

Abby Dodge, The, 223 U. S. 166	22
Abrast Realty Co. *v.* Maxwell, 206 Fed. 333	24
American Net & Twine Co. *v.* Worthington, 141 U. S. 468	47
American Refrigerator Transit Co. *v.* Hall, 174 U. S. 70	31
American Sugar Refining Co. *v.* Louisiana, 179 U. S. 89	13
Anjer Head, The, 46 Fed. 664	21
Arnold *v.* United States, 9 Cranch 104	54, 55
Ayer & Lord Tie Co. *v.* Kentucky, 202 U. S. 409	26
Bailey *v.* Alabama, 219 U. S. 219	10
Barbier *v.* Connolly, 113 U. S. 27	17
Bell's Gap R'd Co. *v.* Pennsylvania, 134 U. S. 232	13
Bischoffsheim *v.* Baltzer, 21 Fed. 531	56
Boston *v.* Turner, 201 Mass. 190	53
Brennert *v.* Farrier, 47 N. J. L. 75	48
Brooks *v.* State, 58 S. W. 1032	49
Brown *v.* Houston, 114 U. S. 622	31
Buck *v.* Beach, 206 U. S. 392	26, 28

	PAGE
Carroll *v.* Greenwich Ins. Co., 199 U. S. 401	19
Cave *v.* Houston, 65 Tex. 619	49
Cheang-Kee *v.* United States, 3 Wall. 320	54
Chicago, B. & Q. Ry. Co. *v.* Babcock, 204 U. S. 585	28
City of Camden *v.* Allen, 26 N. J. L. 398	48, 50
City of Rochester *v.* Bloss, 185 N. Y. 42	48, 56
Coe *v.* Errol, 116 U. S. 517	31
Connolly *v.* Union Sewer Pipe Co., 184 U. S. 540	14
Conqueror, The, 166 U. S. 110	10, 13
Cook *v.* Marshall County, 196 U. S. 261	16
Cotting *v.* Kansas City Stock Yards Co., 183 U. S. 79	14, 17
Crabtree *v.* Madden, 54 Fed. 426	48, 50, 57, 58
Cromwell *v.* Savage, 85 Conn. 376	48
Danforth *v.* Williams, 9 Mass. 324	49
Delaware, L. &c., R.R. Co. *v.* Pennsylvania, 198 U. S. 341	28, 29
Detroit, G. H. & M. Ry. Co. *v.* Fuller, 205 Fed. 86	13, 28
Dollar Savings Bank *v.* United States, 19 Wall. 227	55
Duryee, in re, 2 Fed. Rep. 68	50
Edmonson *v.* City of Galveston, 53 Tex. 157	49
Eidman *v.* Martinez, 184 U. S. 578	20, 33, 46
Entick *v.* Carrington, 19 How. St. Tr. 1029	54
Fairfield Floral Co. *v.* Bradbury, 87 Fed. 415	58
Fayerweather, Matter of, 143 N. Y. 114	43
Flint *v.* Stone Tracy Co., 220 U. S. 145	24
Gautier *v.* Ditmar, 204 N. Y. 20	53
Georgia R.R. Co. *v.* Wright, 124 Ga. 596, 125 Ga. 589; reversed 207 U. S. 127	49
Giozza *v.* Tiernan, 148 U. S. 657	13
Greer *v.* Richards, 3 Ariz. 227	49
Gromer *v.* Standard Dredging Co., 224 U. S. 362	28
Gulf, Colorado & Santa Fe Ry. *v.* Ellis, 165 U. S. 150	13, 14
Harbeck, Matter of, 161 N. Y. 211	43
Hartford *v.* Hills, 72 Conn. 599	46, 48
Hartranft *v.* Wiegmann, 121 U. S. 609	47
Hays *v.* Pacific Mail Steamship Company, 17 Howard 596	26, 30
Henderson *v.* Mayor of New York, 92 U. S. 259	10
Holliday *v.* City of Atlanta, 96 Ga. 377, 23 S. E. 406	41
Home Ins. Co. *v.* New York, 134 U. S. 594	13
Hughes *v.* Kelley, 69 Vt. 443	48

	PAGE
Illinois Central R. Co. v. Adams, 29 So. Rep. 996	49, 52
Jacobs, Matter of, 98 N. Y. 98	17
Johnson v. Howard, 41 Vt. 122	50
Kentucky Central R. Co. v. Pendleton Co., &c., 8 Ky. Law Rep. 517	52
Knowlton v. Moore, 178 U. S. 41	12
Knowlton v. Supervisors of Rock County, 9 Wis. 410	17
Lane County v. Oregon, 7 Wall. 71	50, 53, 58
Litchfield v. County of Webster, 101 U. S. 773	54, 55
Louisville & N. R. Co. v. Commonwealth, 89 Ky. 531	49, 52
Louisville & N. R. Co. v. Hopkins County, 87 Ky. 605	52
Louisville &c. Ferry Co. v. Kentucky, 188 U. S. 385	28, 30
Lynch v. Union Trust Co., 164 Fed. 161	33
McCoach v. Minehill Railway Co., 228 U. S. 295	22, 23
McCulloch v. Maryland, 4 Wheat. 316	30
McWilliams v. Jacobs, 128 Ga. 375	49
Magoun v. Illinois Trust & Savings Bank, 170 U. S. 283	13
Meredith v. United States, 13 Peters 486	53
Meriwether v. Garrett, 102 U. S. 472	50, 53, 58
Metropolitan Life Ins. Co. v. New Orleans, 205 U. S. 395	28
Mezt v. Hagerty, 51 Ohio St. 521	40
M. C. & L. M. Ry. Co. v. Swan, 111 U. S. 379	55
Morgan v. Parham, 16 Wall. 471	26, 30
Mutual Benefit Life Ins. Co. v. Herold, 198 Fed. 199, aff'd 201 Fed. 918	20, 47
National Bank of the Commonwealth v. Mechanics' Nat. Bank, 94 U. S. 437	57
New v. Oklahoma, 195 U. S. 252	54
New Dunderberg Mining Co. v. Old, 97 Fed. 150	57
New Whatcom v. Roeder, 22 Wash. 570	49
Nicol v. Ames, 173 U. S. 509	17
Old Dominion Steamship Co. v. Virginia, 198 U. S. 299	26, 28, 31
Ormsby v. City of Louisville, 79 Ky. 197	52
Parkview Building & Loan Assn. v. Herold, 203 Fed. 876	20, 47
Peirce v. Boston, 3 Mete. 520	50
People v. C. P. R.R. Co., 105 Cal. 576, aff'd 162 U. S. 91	48
People v. County of New York, 5 Cowen 331	55, 56
People v. Gold & Stock Tel. Co., 98 N. Y. 67	46, 48, 56
People v. Hawkins, 157 N. Y. 1	17

PAGE

People v. Marx, 99 N. Y. 377 17
People v. Trust Co. of America, 205 N. Y. 74 38
People ex rel. Farrington v. Mensching, 187 N. Y. 8 15
People ex rel. Lincoln Trust Co. v. Glynn, 132 App. Div. 546, aff'd 198 N. Y. 501 43
People ex rel. Mutual Trust Co. v. Miller, 177 N. Y. 51 .....20, 40, 41, 43
People ex rel. N. Y. C. & H. R. R.R. Co. v. Gaus, 200 N. Y. 328.. 37, 43
People ex rel. Phillips v. Raynes, 136 App. Div. 417, aff'd 198 N. Y. 539 15
People ex rel. P. S. L. Assur. Soc. v. Miller, 179 N. Y. 227, 180 N. Y. 525 39
Perry v. Washburn, 20 Cal. 318 ..... 48, 50, 51
Perry County v. Railroad Co., 65 Ala. 391 49
Pittsburg Coal Co. v. Bates, 156 U. S. 577 31
Pollock v. Farmers' Loan & Trust Co., 157 U. S. 429; 158 U. S. 601 ..... 13, 22, 32
Powell v. Tuttle, 3 N. Y. 396 43
Powers v. Barney, 5 Blatchford 202 47
Pulman's Car Co. v. Pennsylvania, 141 U. S. 18 ..... 28, 31
Railroad Company v. Jackson, 7 Wall. 262 ..... 28, 29
Railroad Company v. Peniston, 18 Wall. 5 31
Railroad Co. v. United States, 101 U. S. 543 54
Redfield v. Ystalyfera Iron Co., 110 U. S. 174 57
Road Commissioners v. Freeholders, 44 N. J. L. 570, aff'd 45 N. J. L. 173 48
Rockland v. Ulmer, 87 Me. 357 49
Sargent & Co. v. Tuttle, 67 Conn. 162 ..... 48, 49
St. Louis v. Ferry Co., 11 Wall. 423 ..... 26, 30
Selliger v. Kentucky, 213 U. S. 200 28
Shaw v. Peckett, 26 Vt. 482 ..... 48, 51
Southern Pacific Co. v. Kentucky, 222 U. S. 63 ..... 26, 28
Southern Ry. Co. v. Greene, 216 U. S. 400 14
Southwestern Oil Co. v. Texas, 217 U. S. 114 13
Spreckels Sugar Refining Co. v. McClain, 192 U. S. 397 47
State v. Mutual Life Ins. Co., 175 Ind. 59 ..... 49, 51
State v. New England Furniture Co., 107 Minn. 52 49
State v. Southwestern R.R. Co., 70 Ga. 11 49
State ex rel. Trustees v. Township, etc., 36 N. J. Law 66 17
State Tax on Foreign-held Bonds, 15 Wall. 300 ..... 28, 29, 30

PAGE

Stitt *v.* Stringham, 55 Ore. 89 ..... 49, 51
Tappan *v.* Merchants' Nat. Bank, 19 Wall. 490 29
Town of Belvidere *v.* Warren R. Co. 34 N. J. L. 193 48
Town of Lyons *v.* Chamberlain, 25 Hun 49, aff'd 89 N. Y. 578 .. 56
Twining *v.* New Jersey, 211 U. S. 78 19
Union Transit Co. *v.* Kentucky, 199 U. S. 194 ..... 26, 28
United States *v.* American Sugar Co., 202 U. S. 563 41
United States *v.* Burr, 159 U. S. 78 41
United States *v.* Chamberlin, 219 U. S. 250 53
United States *v.* Cobb, 11 Fed. 76 54
United States *v.* Del. & Hud. Co., 213 U. S. 366 22
United States *v.* Dodge, 1 Deady 124 54
United States *v.* Erie Railway Co., 106 U. S. 327 ..... 27, 54
United States *v.* Heth, 3 Cranch 399 39
United States *v.* Mexican International R. Co., 154 Fed. 519 58
United States *v.* More, 3 Cranch 159 54
United States *v.* Nipissing Mines Co., 206 Fed. 431 24
United States *v.* Phelps, 17 Blatchf. 312 54
United States *v.* Washington Mills, 2 Cliff. 601 55
United States *v.* Wigglesworth, 2 Story 369 ..... 20, 22, 47
U. S. Fidelity Co. *v.* Struthers Wells Co., 209 U. S. 306 38
Webster *v.* Seymour, 8 Vt. 135 50
Wells *v.* Oregon Ry. & N. Co., 15 Fed. 561 58
Western Union Tel. Co. *v.* Kansas, 216 U. S. 1 28
Western Union Telegraph Co. *v.* Massachusetts, 125 U. S. 530 31
Western Union Tel. Co. *v.* State, 55 Tex. 314; reversed 105 U. S. 460 49
White's Bank *v.* Smith, 7 Wall. 646 32
Young *v.* Godbe, 15 Wall. 562 57
Young *v.* Town of Henderson, 76 N. Car. 420 41

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ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK AND CERTIFICATES FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF ON BEHALF OF PIERCE, BILLINGS, BENNETT AND GOELET'S EXECUTOR, OWNERS OF FOREIGN-BUILT YACHTS.

The cases in which H. Clay Pierce and Cornelius K. G. Billings are the plaintiffs-in-error (Nos. 64–67) come before the court upon writs of error issued out of this court to

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*Since the decision below, Mrs. Harriet Goelet has died. A suggestion of record has been filed by counsel under the authority of her executor, and this brief is filed upon his behalf under like authority.

review the decisions of the Circuit Court of the United States for the Southern District of New York. All the other cases are before the court upon certificates from the Circuit Court of Appeals for the Second Circuit, and in those cases the United States is the plaintiff-in-error.

The actions were brought by the United States at law against the defendants below as managing owners of foreign-built yachts to recover the tax imposed by section 37 of the Tariff Act of August 5, 1909 (ch. 6, 36 Stat. 112), which provides as follows:

> "There shall be levied and collected annually on the first day of September by the collector of customs of the district nearest the residence of the managing owner, upon the use of every foreign-built yacht, pleasure-boat or vessel, not used or intended to be used for trade, now or hereafter owned or chartered for more than six months by any citizen or citizens of the United States, a sum equivalent to a tonnage tax of seven dollars per gross ton.
>
> "In lieu of the annual tax above prescribed the owner of any foreign-built yacht, pleasure-boat or vessel above described may pay a duty of thirty-five per centum *ad valorem* thereon, and such yacht, pleasure-boat or vessel shall thereupon be entitled to all the privileges and shall be subject to all the requirements prescribed by sections forty-two hundred and fourteen, forty-two hundred and fifteen, forty-two hundred and seventeen, and forty-two hundred and eighteen of the Revised Statutes and Acts amendatory thereto in the same manner as if said yacht had been built in the United States, and shall be subject to tonnage duty and light money only in the same manner as if said yacht had been built in the United States.
>
> "So much of section five of chapter two hundred and twelve of the laws of nineteen hundred and eight, approved May twenty-eighth, nineteen hundred and eight, as relates to yachts built outside the United

States and owned by citizens of the United States is hereby repealed.

"This section shall not apply to a foreign-built vessel admitted to American registry."

The act took effect on August 6, 1909, the day following its passage (sec. 42). The collector of the port of New York thereafter made demand in due form upon the defendants for the payment on the succeeding September 1st of a tax equivalent to seven dollars per ton upon the gross tonnage of the foreign-built yachts owned by them as follows: H. Clay Pierce on the yacht "Yacona," 526.14 tons, $3,682 (No. 64, fols. 7, 8); Cornelius K. G. Billings on the yacht "Vanadis," 1091.79 tons, $7,644 (No. 66, fols. 7, 8); James Gordon Bennett on the yacht "Lysistrata," 1942.75 tons, $13,601 (No. 629, fol. 2), and Harriet Goelet on the yacht "Nahma," 1739.83 tons, $12,180 (No. 631, fol. 2). In the following year, similar demands were made for the payment of the taxes due on September 1st, 1910 (Nos. 65 and 67, fols. 7–9; No. 630, fols. 2, 5½; No. 632, fols. 2, 7x). The defendants not having paid the tax nor compounded it by paying the duty of thirty-five per cent. *ad valorem*, these actions were brought. The actions which were designated "No. 1" below, being Nos. 64, 66, 623, 625, 629 and 631 in this court, involve the tax for the year ended September 1, 1909; and the actions which were designated "No. 2" below, being Nos. 65, 67, 624, 626, 630 and 632 in this court, involve the tax for the year ended September 1, 1910.

The amended complaints in the suits to recover the taxes for 1909 (Nos. 64 and 66, fols. 7–8; Nos. 629 and 631, fols. 2–3), after averring the sovereignty of the plaintiff and the citizenship of the defendants, allege that on

September 1, 1909, the defendants were managing owners of their respective yachts, and that on that date the collector of customs at the port of New York, being the collector of the district nearest the residence of the defendants, had fixed and determined and thereby levied the tonnage tax, and prior to the commencement of suit had demanded payment thereof, but that no part had been paid nor had the defendants paid a duty of thirty-five per cent. *ad valorem* upon the yachts in lieu of the tax. By their amended answers (Nos. 64 and 66, fols. 10–12; Nos. 629 and 631, fol. 3), all the defendants set up that their respective yachts were not registered, enrolled or documented as vessels of the United States, that such yachts were not entitled to enjoy or exercise, and have never enjoyed or exercised, any rights, privileges or protection as vessels of the United States, that the act of Congress now under consideration was intended to impose an annual tax upon use thereafter and was not intended to operate retrospectively, and that therefore the tax imposed by it did not accrue or become collectible prior to September 1, 1910. The answers further averred that at the time of the passage of the act and the imposition of the tax, there were within the United States a large number of other like vessels, not foreign-built, similar in all substantial respects in character and use as personal property of citizens of the United States upon which no tax was imposed by the act, that the act, in so far as it purported to impose a tax upon the use of the yachts of the defendants, was not a general law operating upon all owning and using like property under substantially similar conditions and circumstances, and that the levy and collection of the

tax would not constitute the levy and collection of any tax, duty, impost, or excise within the true meaning of the Constitution of the United States, but, on the contrary, would operate to deprive the defendants of their property without due process of law. The allegation that each defendant was a citizen of the United States was not traversed.

In addition to these allegations, other material facts were averred by the various defendants. The defendant Pierce pleaded (No. 64, fol. 11) that his yacht, the "Yacona," had not been used by him or any one else during the year preceding September 1, 1909, but during that year was out of commission and laid up unused (see also No. 65, p. 19); the defendant Billings set up (No. 66, p. 6) that his yacht, the "Vanadis," had not been used for six months during the year for which the tax was demanded of him within the territorial jurisdiction of the United States; the defendant Bennett averred (No. 629, fol. 3) that his yacht, the "Lysistrata," "since 1904 . . . had not been within the jurisdiction of the United States, but had had a permanent situs within the jurisdiction of the Republic of France," and the defendant Goelet alleged (No. 631, fol. 3) that for several years prior to September 1, 1909, she had been permanently a resident of and domiciled in France, "and that since 1901 her said yacht [the "Nahma"] had not been within the jurisdiction of the United States, but had had a permanent situs within the jurisdiction of Great Britain."

The United States demurred to all the answers in the suits involving the tax for 1909 upon the ground that they were insufficient in law and did not state facts

sufficient to constitute defenses to the causes of action (Nos. 64 and 66, p. 7; Nos. 629 and 631, fol. 4). The demurrers came on for hearing in the Circuit Court, and were sustained as to the answers of the defendants Pierce and Billings (Nos. 64 and 66, p. 20), and overruled as to the answers of the defendants Bennett and Goelet (Nos. 629 and 631, fol. 4). The opinion of Circuit Judge Noyes is printed at page 8 in No. 64, and is reported. 190 Fed. 359. Judgments were thereafter entered in accordance with the opinion of the court. The defendants Pierce and Billings sued out writs of error direct to this court (Nos. 64 and 66), while the United States sued out writs of error to the Circuit Court of Appeals to review the judgments in favor of the defendants Bennett and Goelet. The questions involved in the last-mentioned cases were subsequently certified to this court (Nos. 629 and 631).

The United States having recovered in the Pierce and Billings cases, judgments were accordingly entered in its favor for the amount of the tax with costs, but its application for the allowance of interest from the date on which the tax was held to be payable was denied (Nos. 623 and 625, fol. 2). The United States thereupon obtained writs of error to the Circuit Court of Appeals to review this ruling, and the Circuit Court of Appeals has certified this question also in cases Nos. 623 and 625.

The facts in the actions brought to recover the tax for the year 1910 are similar to those above set forth, except that the additional facts appeared in those cases that certain customs regulations had been established by various Secretaries of the Treasury, that the respective de-

fendants had caused their bills of sale of their yachts to be recorded in the office of the Collector of Customs (Nos. 65 and 67, pp. 18, 19; Nos. 630 and 632, pp. 2, 3), that the defendants Bennett and Goelet during 1910 and prior thereto had used their yachts in foreign waters and on the high seas, and that both of these defendants were permanently residing and domiciled abroad (Nos. 630 and 632, pp. 1, 3). These actions were tried before the court without a jury, and the court followed the previous rulings in all respects. Thereafter proceedings looking towards a review of these cases were taken in substantially the same manner as is above described with reference to the actions which involve the tax for 1909.

Section 37 of the Tariff Act of 1909 has been repealed by the present Congress. Section IV, S, of the Tariff Act of October 3, 1913.

Assignments of error.

It is now urged that the court below erred—

I. In not holding that the classification contained in this taxing act was in conflict with the Fifth Amendment to the Constitution of the United States.

II. In holding that the tax in question upon the use of foreign-built yachts was leviable notwithstanding proof of the absence of use during the taxable period.

III. In holding that the full amount of the tax became due and payable on September 1, 1909.

It is further urged that the court below did not err in holding—

I. That the tax was not leviable upon citizens permanently resident and domiciled abroad with respect to the

use by them of foreign-built yachts having their permanent location in a foreign country and used wholly without the territorial jurisdiction of the United States.

II. That the United States was not entitled to recover interest because interest was not imposed by the act.

I.

THE CLASSIFICATION IN SECTION 37 VIOLATES THE FIFTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

The defendants do not challenge the power of Congress to select as a subject for excise taxation the use of particular articles of personal property; nor do they challenge the power to tax the use of *all* yachts by an excise operating impartially on such use. But they submit that when Congress determines that the use of yachts, or of any other particular kind of personal property, shall be taxed, it cannot discriminate against any of those among the class using identically the same kind of property under similar conditions, or discriminate between citizens and resident aliens, and that any such discrimination violates the principles of political justice and equality before the law embodied in the conception of "due process of law" guaranteed by the Fifth Amendment to the Constitution of the United States. If, indeed, there be one rule of universal application, essential to due process of law in taxation, it is that a tax law must be imposed impartially upon all in the same class similarly situated, and that it must apply equally and uniformly to all persons in like circumstances or under like conditions. The very nature and definition of a tax import this requirement. The present

tax law makes no pretense to equality and hence lacks the very semblance of true tax legislation. A statute purporting to lay a discriminatory tax is not an exercise of the taxing power but a mere taking of private property without due compensation.

It is important to emphasize that the statute now before the court does not in terms undertake to impose a tax upon the ownership or the importation of property, but solely upon the *use* of particular property, and that it adopts tests applicable to no other property of any kind, namely, the test of place of origin of the property used and of citizenship of its owner. A domiciled alien may *use* a foreign-built boat in our ports and navigable waters without the payment of the tax, but a citizen cannot so *use* such a vessel without paying the annual tax or purchasing immunity by paying "a duty of thirty-five per cent. *ad valorem*." If such a theory were applied to other forms of taxation, there would be little hesitation in adjudging the invalidity of the legislation. A tax on land collectible only from citizens and exempting resident aliens would be absurdly lacking in the essentials of taxation. So a tax on personal property of citizens according to its place of origin and exempting similar property simply because it originated in the United States or was owned or used by a resident alien, would be equally in conflict with all our present ideas of what a tax law must be, or of what the courts have heretofore declared to be permissible in classification for taxing purposes.

The American citizens now before the court purchased their several yachts at a time when no import duty or excise tax was imposed or ever had been imposed by Con-

gress upon foreign-built yachts (*The Conqueror*, 166 U. S. 110), and presumably they have duly paid the tonnage tax laid upon all vessels classed as foreign. The practical effect of the legislation now before the court is to penalize the owners of such yachts as "*The Conqueror*," and to compel them to pay an import "duty of thirty-five per centum *ad valorem*" as the alternative to submitting to this new tax. If we are to judge a statute and determine its purpose by its practical effect,* the act of 1909 is precisely the same as if it had provided in so many words that all citizens who had theretofore acquired foreign-built yachts should pay a retrospective import "duty of thirty-five per centum *ad valorem*" in order to escape an annual tax of seven dollars per ton. The owner of "*The Conqueror*" is thus practically forced to pay the very tax which this court adjudged he was not liable to pay when he acquired that foreign-built yacht and first brought her to an American port. In other words, thirty-five per cent. is added to the cost of his yacht eighteen years after purchase, and thus there is nullified by indirection the right which this court then declared and upheld.

The selection in the act of 1909 must be recognized to be unreasonable and arbitrary as those terms are employed in this branch of the law. What conceivable difference is there between the *use* of a foreign-built yacht and the *use* of identically the same kind of yacht built in the United States? Why should citizens enjoying exactly the same use be divided into two classes, to be determined according to the place of origin of the property which

* *Henderson* v. *Mayor of New York*, 92 U. S. 259, 268; *Bailey* v. *Alabama*, 219 U. S. 219, 244.

they use? Why should a citizen who charters a foreign-built yacht for six months, which covers the usual yachting season, be free from all tax, and a citizen who charters such a yacht for a day more than six months be taxed? Why should an owner be taxed if he *uses* a foreign-built yacht for one day (if that be the meaning of the act) and all charterers be exempt from taxation upon such *use* if the charter is not "for more than six months?" Why should citizens be selected for taxation while resident aliens, constituting a very large class enjoying the same use, are exempted? There are millions of aliens residents in the United States. There is no reason in these distinctions. The origin of an article can have no relation whatever to its actual present use. The *use* of yachts is absolutely the same whether built here or abroad, whether called domestic or foreign, whether owned by citizens or by aliens. The tests applied by the act are entirely unique in federal taxation. They do not depend upon any essential element of the subject matter of the tax, which is the *use* of a yacht within the jurisdiction of the taxing power.

If, for example, Congress should now tax the use of foreign-built automobiles by citizens and exempt all domestic-built automobiles and all automobiles wherever built used by resident aliens, would not the discrimination be manifestly unreasonable and constitutionally speaking arbitrary? The tax plainly would not apply to all persons within the same class, that is, all persons using automobiles.

In Cooley on Taxation (3rd ed.), pp. 4, 260, the learned author says:

"In an exercise of the power to tax, the purpose

always is that a common burden shall be sustained by common contributions, regulated by some fixed general rule, and apportioned by the law according to some uniform ratio of equality. So the power is not arbitrary, but rests upon fixed principles of justice, which have for their object the protection of the taxpayer against exceptional and invidious exactions, and it is to have effect through established rules operating impartially. . . . .

"But when, for any reason, it becomes discriminative between individuals of the class taxed, and selects some for an exceptional burden, the tax is deprived of the necessary element of legal equality, and becomes inadmissible. It is immaterial on what ground the selection is made: whether it be because of residence in a particular portion of the taxing district, or because the persons selected have been remiss in meeting a former tax for the same purpose, or because of any other reason, plausible or otherwise; for if the principle of selection be once admitted, limits cannot be set to it, and it may be made use of for the purposes of oppression, or even of punishment."

A review of some of the leading cases on the subject of classification in taxation will tend to show that the classification in the act of 1909 is in conflict with sound principles of constitutional taxation. In *Knowlton* v. *Moore*, 178 U. S. 41, 77, the court in speaking of taxation by Congress said:

"It may be doubted by some, aside from express constitutional restrictions, whether the taxation by Congress of the property of one person, accompanied with an arbitrary provision that the rate of tax shall be fixed with reference to the sum of the property of another, thus bringing about the profound inequality which we have noticed, would not transcend the limitations arising from those fundamental conceptions of free government which underlie all constitutional systems."

In *American Sugar Refining Company* v. *Louisiana*, 179 U. S. 89, 92, Mr. Justice Brown said:

> "Of course, if such discrimination were purely arbitrary, oppressive or capricious, and made to depend upon differences of color, race, nativity, religious opinions, political affiliations or other considerations having no possible connection with the duties of citizens as taxpayers, such exemption would be pure favoritism, and a denial of the equal protection of the laws to the less favored classes."

And in *The Conqueror*, 166 U. S. 110, 115, Mr. Justice Brown said:

> "If she [the foreign-built yacht] be dutiable at all, it must then be because she was bought by an American citizen. But why should this make her dutiable? She is not imported or taken into the country in the ordinary sense in which that term is used with reference to other articles, does not become commingled with the general mass of property, and is employed precisely as she might be legally employed by her foreign owners, or by an American citizen leasing her from such owner. Other articles are dutiable, not because they have been purchased, but because they are actually imported and become the subject of sale and commerce within the country. But if a yacht be dutiable when purchased, and only when purchased by an American citizen, we apply a test of dutiability that we apply to no other article, namely, the test of ownership."

See also *Bell's Gap R'd Co.* v. *Pennsylvania*, 134 U. S. 232, 237; *Gulf, Colorado & Santa Fe R'y* v. *Ellis*, 165 U. S. 150, 165; *Magoun* v. *Illinois Trust & Savings Bank*, 170 U. S. 283, 301; *Home Ins. Co.* v. *New York*, 134 U. S. 594, 606-7; *Giozza* v. *Tiernan*, 148 U. S. 657, 662; *Pollock* v. *Farmers' Loan & Trust Co.*, 157 U. S. 429, 599; *Southwestern Oil Co.* v. *Texas*, 217 U. S. 114, 121; *Detroit, G. H. & M. Ry. Co.* v. *Fuller*, 205 Fed. 86, 89.

The case of *Southern Railway Company* v. *Greene*, 216 U. S. 400, involved the constitutionality of a law of Alabama imposing a special franchise tax upon foreign corporations in addition to an occupation tax applicable to all individuals, firms and corporations, and forbidding such foreign corporations to do any business in the state, not constituting interstate commerce, unless the tax should be paid within sixty days after its due date. The Railway Company had carried on business in the state for many years, and, as permitted and authorized by existing laws, had acquired a large amount of property therein. Mr. Justice Day, speaking for the court (at p. 417), said:

> "While reasonable classification is permitted, without doing violence to the equal protection of the laws, such classification must be based upon some real and substantial distinction, bearing a reasonable and just relation to the things in respect to which such classification is imposed; and classification cannot be arbitrarily made without any substantial basis. Arbitrary selection, it has been said, cannot be justified by calling it classification. *Gulf, Colorado & Santa Fe Ry.* v. *Ellis*, 165 U. S. 150, 155, 165; *Cotting* v. *Kansas City Stock Yards Co.*, 183 U. S. 79; *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S. 540, 559.
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> "It is averred in the complaint, and must be taken as admitted, that there are other corporations of a domestic character in Alabama carrying on the railroad business in precisely the same way as the plaintiff. It would be a fanciful distinction to say that there is any real difference in the burden imposed because the one is taxed for the privilege of a foreign corporation to do business in the State and the other for the right to be a corporation. *The fact is that both corporations do the same business in character and kind, and under the statute in question a foreign corporation may be taxed many thousands of dollars for the privilege of doing, within the State, exactly*

> *the same business as the domestic corporation is permitted to do by a tax upon its privilege, amounting to only a few hundred dollars. We hold, therefore, that to tax the foreign corporation for carrying on business under the circumstances shown, by a different and much more onerous rule than is used in taxing domestic corporations for the same privilege, is a denial of the equal protection of the laws, and . . . does violence to the Federal Constitution.*"

The particular question of the selection of property *according to origin* as a subject for a special form of taxation was discussed at length in the recent case of *People ex rel. Phillips* v. *Raynes*, 136 App. Div. 417, affirmed in 198 N. Y. 539. That case involved the consideration of section 190 of the Labor Law of the State of New York which prohibited the sale of convict made goods without the payment of an annual license fee of $500. The legislation was held to be void as a revenue or tax law because contrary to the Fourteenth Amendment. Mr. Justice Clarke said (p. 425):

> "*A classification by origin*, applied to a vast variety of goods, *seems to be more unreasonable than any enumerated by the Court of Appeals.* So that, if we should hold that this statute . . . does not, under the guise of a licensing act, practically prohibit the buying and selling within this State of goods, wares and merchandise produced in another State and look at it solely as a revenue act, we are forced to the conclusion that it is an unconstitutional exercise of legislative power and hence invalid."

In condemning an arbitrary selection for purposes of taxation in *People ex rel. Farrington* v. *Mensching*, 187 N. Y. 8, 17-22, the New York Court of Appeals reviewed all the leading cases on the subject of classification in taxation and used language to which the attention of the

court is particularly directed. Among other things, the court said:

> "The act now before us does not classify by arranging according to quality, but by arranging according to accident. While it places all corporate shares in a class, still it does not treat all members of the class alike, but without method or order bears heavily upon some and lightly upon others, which, in effect, is a further classification . . . . While the legislature has wide latitude in classification its power in that regard is not without limitation, for the classification must have some basis, reasonable or unreasonable, other than mere accident, whim or caprice. There must be some support of taste, policy, difference of situation or the like, some reason for it even if it is a poor one. While the state can tax some occupations and omit others, can it tax only such members of a calling as have blue eyes or black hair? We have said that it could tax horses and leave sheep untaxed, but it does not follow that it could tax white horses and omit all others, or tax the sale of certificates printed on white paper and not those on yellow or brown. While one class may be made of horses and another of sheep, or even a class made of race horses, owing to the use made of them, without a shock to common sense, a classification limited to white horses would be so arbitrary as to amount to tyranny, because there would be no semblance of reason for it. A reason might be advanced, although specious and unsound, for taxing Holstein bulls and no others, but could even a sophist argue in favor of taxing Holstein steers and no others, since they are incapable of reproduction? A classification of dealers in cigarettes into those selling at wholesale without the state and those selling at retail within the state was sustained on the ground that the two occupations are distinct (*Cook* v. *Marshall County*, 196 U. S. 261, 274), but could dealers in any commodity be classified according to age, size or complexion? A classification of sales into those made in an exchange and those made elsewhere was

sustained in another case, but could exchanges be so classified as to tax only such sales as are made in those carried on in brick buildings? (*Nicol* v. *Ames*, 173 U. S. 509.) Perhaps an answer to these questions may be found in *Cotting* v. *Kansas City Stock Yard Co.* (183 U. S. 79), where a general act, the effect of which was to so classify stockyards in the state of Kansas as to discriminate against the largest stockyard in the state, but without mentioning it by name, was held to be unconstitutional because it denied to that company the equal protection of the laws. A similar fate met an act of another state, which provided that a certain tax should be imposed only upon those taxable inhabitants of a school district who had not paid a tax assessment in the year 1871. (*State ex rel. Trustees* v. *Township, etc.*, 36 N. J. Law, 66.) Even if a tax on farms according to acreage might be sustained, it is obvious that a tax on farms according to the number of fields into which they are divided would not be valid. Such a classification would not treat all in the same class alike, and would impose a heavier burden upon one farm than upon another of the same size, situation and value. A statute imposing such a tax would not give 'that equal protection and security' to which all, under like circumstances, are entitled 'in the enjoyment of their personal and civil rights.' (*Barbier* v. *Connolly*, 113 U. S. 27; *Matter of Jacobs*, 98 N. Y. 98; *People* v. *Marx*, 99 N. Y. 377.)"

See also *People* v. *Hawkins*, 157 N. Y. 1, 9.

The Supreme Court of Wisconsin in *Knowlton* v. *Supervisors of Rock County*, 9 Wis. *410, *422, answering the contention that a tax law was not discriminatory if all literally within a selected class were uniformly taxed, used the following language:

"We do not see why the system may not be carried further and the classification [of particular property] be made by the character, trade, profession or business of the owners. For certainly this

rule of uniformity can as well be applied to such a classification as any other, and thus the constitutional provision be saved intact. Such a construction would make the constitution operative only to the extent of prohibiting the legislature from discriminating in favor of particular individuals, and would reduce the people, while considering so grave and important a proposition, to the ridiculous attitude of saying to the legislature, 'you shall not discriminate between single individuals or corporations, but you may divide the citizens up into different classes as the followers of different trades, professions, or kinds of business, or as the owners of different species or descriptions of property, and legislate for one class and against another, as much as you please, provided you serve all of the favored or unfavored classes alike'; thus affording a direct and solemn constitutional sanction to a system of taxation so manifestly and grossly unjust, that it will not find an apologist anywhere, at least outside of those who are the recipients of its favors. We do not believe the framers of that instrument intended such a construction, and therefore cannot adopt it."

In the cases now before the court we have not only the admission but the adjudication that numerous other yachts exercising exactly the same right or privilege under like conditions and circumstances are not taxed.* They all belong to persons of one class: users of yachts. There is obviously and notoriously no real difference in the use which is taxed from the use which is exempted. In the case of import duties, it is, of course, true that the foreign origin of the article imported is necessarily the basis and test of the duty. The yacht tax now before the court, however, purports to be an excise tax upon the *use* of an article and not upon its importation. The law, therefore,

* Recs. Nos. 64 and 66, fols. 11, 12; No. 65, fol. 34; No. 67, p. 21; Nos. 629 and 631, fol. 3; No. 630, fol. 5½; No. 632, p. 4.

must be treated solely as an excise tax upon *use*, and cannot be sustained upon a theory which might uphold an import duty.

There is no substantial difference between the requirement of due process of law contained in the Fifth Amendment and that in the Fourteenth Amendment. *Carroll* v. *Greenwich Ins. Co.*, 199 U. S. 401, 410; *Twining* v. *New Jersey*, 211 U. S. 78, 101. They are alike in terms and alike in meaning. The provision for the equal protection of the law in the Fourteenth Amendment no doubt emphasizes the necessity for proper classification in state taxation, but it does not create this requirement. The due process clause alone would be equally effective for this purpose. McGehee's Due Process of Law, pp. 60-64, 311. Indeed, nothing could be deemed a more inherent requirement of due process of law in taxation than equality among the same class under like conditions. The authorities cited by the Government below to maintain the contrary with reference to the Fifth Amendment, if read in the light of their particular facts and the questions actually decided, will be seen to establish nothing contrary to the above contentions.

It is, therefore, submitted that the classification made by the act under consideration is an arbitrary classification, and that it should be adjudged to conflict with the provisions of the Fifth Amendment to the Constitution of the United States in that it deprives citizens of the United States of property without due process of law.

II.

THE ACT OF CONGRESS REQUIRES USE OF A FOREIGN-BUILT YACHT DURING THE TAXABLE PERIOD.

In examining the applicability of section 37 of the act of August 5, 1909, to the cases at bar, regard must be had for the settled rules of law which require that tax statutes, especially when attempting to impose special, novel and extraordinary taxes, should be strictly construed, and that, if any ambiguity be found to exist, it must be resolved in favor of the citizen. This principle has been frequently reaffirmed by the court (*Eidman* v. *Martinez*, 184 U. S. 578, 583; *United States* v. *Wigglesworth*, 2 Story 369, 374), and has recently been applied to the Tariff Act of August 5, 1909. *Mutual Benefit Life Ins. Co.* v. *Herold*, 198 Fed. 199, 201, aff'd 201 Fed. 918; *Parkview Bldg & Loan Assn* v. *Herold*, 203 Fed. 876, 880. "The government takes nothing except what is given by the clear import of the words used, and a well-founded doubt as to the meaning of the act defeats the tax." *People ex rel. Mutual Trust Co.* v. *Miller*, 177 N. Y. 51, 57.

Section 37 of the act of August 5, 1909, provides that "there shall be levied and collected annually . . . upon the *use* of every foreign-built yacht . . . not used or intended to be used for trade . . . a sum equivalent to a tonnage tax of seven dollars per gross ton." The learned court below proceeded upon the theory that although the statute expressly levied the tax in question "upon the *use* of every foreign-built yacht," nevertheless no use whatever need be alleged or shown.

The language of the statute plainly indicates that it was the intention of Congress to levy a tax not upon yachts as property but solely "upon the *use* of every foreign-built yacht." The test thus provided by the act itself is *use*, which means "to put to a purpose," "to employ," "to make use of." *The Anjer Head*, 46 Fed. 664. Hence, by the very language of the statute, some actual use or employment is clearly contemplated and made a condition precedent to liability for the tax.

The distinction between an excise tax on the use of a thing and a direct tax upon the thing itself is, of course, fundamental and substantial. But it would vanish into nothingness if "use" be now construed to mean not actual use at all but mere capacity for use. If a yacht owner is to be taxed upon the use of his yacht when he does not use it and when it is not even in commission, he is in truth being taxed because of his ownership of the yacht. Such a tax would be an excise in name only, but a property or direct tax in reality.

Certainly it would violate all the long established and well-settled canons for the construction of tax statutes to strain the meaning of the common and well-understood term "use" to include mere ownership without any use whatever. If Congress had intended to tax mere ownership without use, it surely would have chosen appropriate language. The tax would have been levied upon every foreign-built yacht owned or chartered by a citizen. The idea is a simple one, and could readily have been expressed. It is, however, not expressed, nor intended to be expressed, in section 37 of the act of August 5, 1909, and the statute should not be enlarged beyond its ex-

pressed intent by judicial construction. It has long been the law "in the interpretation of all statutes, levying taxes or duties upon subjects or citizens, not to extend their provisions, by implication, beyond the clear import of the language used, or to enlarge their operation so as to embrace matters, not specifically pointed out." *United States* v. *Wigglesworth*, 2 Story 369, 373, 374.

It is well-known, or at any rate highly probable, that the word "use" was advisedly employed in order to avoid creating what might be held to be a direct tax on the property, and as such necessary to be apportioned. *Pollock* v. *Farmers' Loan & Trust Co.*, 157 U. S. 429; 158 U. S. 601; *McCoach* v. *Minehill Railway Co.*, 228 U. S. 295, 306. The court will not, therefore, now adopt a construction of the statute which would create grave doubts as to its constitutionality, when another construction, which avoids all constitutional difficulties, is not only equally consistent with the terms of the act, but more consonant with its plain intent. As the court itself has said: "Where a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter." *United States* v. *Del. & Hud. Co.*, 213 U. S. 366, 408; *The Abby Dodge*, 223 U. S. 166, 175.

In the recent case of *McCoach* v. *Minehill Railway Co.*, 228 U. S. 295, a similar question of statutory construction was presented under section 38 of the same act of Congress. This section provides that every corporation of a designated kind "shall be subject to pay annually a special excise tax with respect to the carry-

ing on or doing business by such corporation" (36 Stat., c. 6, p. 112). It there appeared that the Minehill Company was a duly organized railroad corporation and the owner of a railway which it had ceased to operate but which it had leased to the Reading Company, and that the Minehill Company still retained all its corporate powers and had agreed to use the same whenever requested by its lessee. The court held that the tax was imposed upon the doing of corporate business and with respect to the carrying on of such business and not upon the franchises or property of the corporation irrespective of their use in business, and that, therefore, the Minehill Company was not liable for the tax because it had not carried on any business. In other words, this court declined to reconstruct the statute and construe it as if the words "with respect to the carrying on or doing business by such corporation" were not in the statute. In the cases at bar the court is urged by the Government to construe section 37 of the same statute so as to eliminate and disregard the words "the use of" employed by Congress. The court can properly exercise no such power. To the analogous argument of the Government in the *Minehill* case that the defendant company, even if it had not actually carried on business, nevertheless had the power so to do, and was therefore within the intent of the statute, the court replied that an actual doing of business was required by the statute before the corporation could be taxed and it could not by construction dispense with that requirement. The court said at p. 305:

> "We cannot . . . agree with the contention made in behalf of the Government that because the Minehill Company retains its franchise of corporate existence, maintains its organization, and holds itself ready to

> exercise its franchise of eminent domain, or other reserved powers, if and when required by the lessee, and ready to resume possession of the property at the expiration of the lease, it is therefore to be treated as doing business, in respect of the railroad, within the meaning of the Corporation Tax Law. As to these matters the case is governed by what was said by the court in *Flint* v. *Stone Tracy Co.*, 220 U. S. 145,—'It is . . . apparent, giving all the words of the statute effect, that the tax is imposed not upon the franchises of the corporation irrespective of their use in business, nor upon the property of the corporation, but upon the doing of corporate or insurance business and with respect to the carrying on thereof. . . . The tax is not payable unless there be a carrying on or doing of business in the designated capacity, and this is made the occasion for the tax.'"

See also *United States* v. *Nipissing Mines Co.*, 206 Fed. 431; *Abrast Realty Co.* v. *Maxwell*, 206 Fed. 333.

It is submitted that similar principles govern the present cases. Like the corporation income tax, the foreign-built yacht tax is an excise and not a property or license tax. In the former, the tax is imposed upon the *doing* of corporate business, in the latter upon the *use* of a foreign-built yacht. To be subject to the corporation tax there must have been an actual *doing* of business, and to be subject to the foreign-built yacht tax, there must have been an actual *use* of the yacht.

No distinction between the taxes can be erected out of the difference in their wording. The corporation tax provides that every corporation "shall be subject to pay annually a special excise tax with respect to the carrying on or doing business by such corporation." In other words, that there shall be levied and collected annually, upon the carrying on or doing business by corporations, a certain amount as an excise tax. The foreign-built

yacht tax declares that "there shall be levied and collected annually . . . upon the use of every foreign-built yacht . . . a sum equivalent to a tonnage tax of seven dollars per gross ton." There is consequently no substantial difference between these provisions, and they require the same construction. Hence, it follows that no owner of a foreign-built yacht can be held liable for the tax when it affirmatively appears that his yacht has been out of commission and not in actual use during the taxable period.

It follows that the judgment against the defendant Pierce, whose yacht was shown to have been wholly out of commission and unused during the two years in question (No. 64, fol. 11; No. 65, p. 19), was erroneous and should be reversed.

III.

TAX IS NOT LEVIABLE IN RESPECT OF FOREIGN-BUILT YACHTS NOT WITHIN THE JURISDICTION OF THE UNITED STATES.

The defendants Bennett and Goelet proved that they were permanent residents of foreign countries, where they are domiciled, and that their respective yachts had their permanent situs abroad and had been used only outside of the territorial jurisdiction of the United States. This situation caused the Circuit Court of Appeals to certify to this court the following questions (No. 631, fol. 5):

> "Has Congress the power to levy a tax upon the use by a citizen of the United States of a yacht which is not actually, and since the year 1901 was not at any time, used within the territorial juris-

diction of the United States and which has its permanent situs in a foreign country? and

"Has Congress the power to levy a tax upon the use by a citizen of the United States of a yacht which is not actually, and since the year 1901 was not at any time, used within the jurisdiction of the United States and which has its permanent situs in a foreign country, when the owner is permanently resident and domiciled in a foreign country?"

It is submitted that property or the use of property permanently located abroad cannot be taxed in the United States without disregarding the general rule that "property in order to be the subject of taxation must be within the jurisdiction of the power assuming to tax." *Buck* v. *Beach,* 206 U. S. 392, 400. Even if the yachts in question had no permanent situs anywhere, the fact that their owners were domiciled abroad would fix their situs there. In *Southern Pacific Co.* v. *Kentucky,* 222 U. S. 63, 69, the court decided that the taxable situs of a vessel which has no permanent location is the domicile of the owner, Mr. Justice Lurton saying:

"The persistence with which this court has declared and enforced the rule of taxability at the domicile of the owner of vessel property, when it did not appear that the vessels had an actual situs elsewhere, is illustrated by the cases of *Hays* v. *Pacific Mail Steamship Company,* 17 Howard, 596; *Morgan* v. *Parham,* 16 Wallace, 471; *St. Louis* v. *Ferry Co.,* 11 Wallace, 423; *Old Dominion Steamship Co.* v. *Virginia,* 198 U. S. 299, and the case of *Ayer & Lord Tie Co.* v. *Kentucky,* 202 U. S. 409."

This decision, supplementing the rule announced in *Union Transit Co.* v. *Kentucky,* 199 U. S. 194, would seem conclusive against the right of the Government to recover of the defendants Bennett and Goelet, who are

not only domiciled in France, but whose yachts are permanently located in France or Scotland. The principle governing the liability of vessels to taxation as property at the domicile of the owner or at the vessel's permanent situs governs by analogy in respect to taxation upon the use of vessels, where such use is wholly beyond the territorial jurisdiction of the taxing power. Under the contention of the Government, a citizen may be taxed for the use of property which has never been and may never be within the jurisdiction of Congress. If the Federal Government may impose an excise tax upon the *use* of a foreign-built yacht by one of its citizens outside of its territorial limits, which a state could not do, then it may impose a like tax upon his *use* of real or personal property of any kind or nature in any foreign country. No adjudged case lends support to any such power on the part of Congress. To the contrary, in *United States* v. *Erie Railway Co.*, 106 U S. 327, 332, Mr. Justice Field, dissenting, declared that—

> "It was said by counsel on the argument of the case . . . that Congress might impose a tax upon property anywhere in the world, and this court could not question the validity of the law, though the collection of the tax might be impossible, unless, perchance, the owner of the property should at some time visit this country or have means in it which could be reached. This court will, of course, never, in terms, announce or accept any such doctrine as this."

It is a settled rule of constitutional law that the power to tax depends upon jurisdiction of the subject matter of the tax. A long line of unbroken authority illustrates this firmly established doctrine in its various

aspects, and, although the cases have all arisen under state tax laws, their reasoning is applicable and controlling in the case of a federal tax act. The sound principle upon which all these decisions proceed is that it is a requirement, inherent in the very nature of constitutional government, that taxation must have relation to some subject-matter actually within the jurisdiction of the taxing power, and, if it has not, that it violates the constitutional guaranty against the taking of property without due process of law. Under this principle, neither a state nor the Federal Government can tax the property of citizens situated in foreign countries, or the use of such property in foreign countries. *Railroad Company* v. *Jackson*, 7 Wall. 262, 267; *State Tax on Foreign-held Bonds*, 15 Wall. 300, 319; *Pullman's Car Co.* v. *Pennsylvania*, 141 U. S. 18, 22; *Louisville &c. Ferry Co.* v. *Kentucky*, 188 U. S. 385, 398; *Old Dominion Steamship Co.* v. *Virginia*, 198 U. S. 299, 307; *Delaware, L. &c. R.R.* v. *Pennsylvania*, 198 U. S. 341, 353; *Union Transit Co.* v. *Kentucky*, 199 U. S. 194, 209; *Chi., B. & Q. Ry. Co.* v. *Babcock*, 204 U. S. 585, 592; *Metropolitan Life Ins. Co.* v. *New Orleans*, 205 U. S. 395, 399; *Buck* v. *Beach*, 206 U. S. 392, 400; *Selliger* v. *Kentucky*, 213 U. S. 200, 203; *Western Union Tel. Co.* v. *Kansas*, 216 U. S. 1, 38; *Southern Pacific Co.* v. *Kentucky*, 222 U. S. 63, 73; *Gromer* v. *Standard Dredging Co.*, 224 U. S. 362, 372, 376, 377; *Detroit, G. H. & M. Ry. Co.* v. *Fuller*, 205 Fed. 86, 90.

The case of *Union Transit Co.* v. *Kentucky*, 199 U. S. 194, presented a question analogous to that now raised with regard to section 37 of the act of Con-

gress of August 5, 1909. It involved the right of the State of Kentucky to tax a Kentucky corporation upon cars owned and used by it, but permanently located and used in other states. Mr. Justice Brown, who delivered the opinion of the court, exhaustively investigated the subject, and thereupon summarized the law regarding the relation of taxation to jurisdiction as follows (pp. 202, 204, 206, 210):

> "The power of taxation, indispensable to the existence of every civilized government, is exercised upon the assumption of an equivalent rendered to the taxpayer in the protection of his person and property, in adding to the value of such property, or in the creation and maintenance of public conveniences in which he shares, such, for instance, as roads, bridges, sidewalks, pavements, and schools for the education of his children. If the taxing power be in no position to render these services, or otherwise to benefit the person or property taxed, and such property be wholly within the taxing power of another State, to which it may be said to owe an allegiance and to which it looks for protection, the taxation of such property within the domicil of the owner partakes rather of the nature of an extortion than a tax, and has been repeatedly held by this court to be beyond the power of the legislature and a taking of property without due process of law. *Railroad Company* v. *Jackson*, 7 Wall. 262; *State Tax on Foreign-held Bonds*, 15 Wall. 300; *Tappan* v. *Merchants' National Bank*, 19 Wall. 490, 499; *Delaware &c. R.R. Co.* v. *Pennsylvania*, 198 U. S. 341, 358. . . . .
>
> "It is also essential to the validity of a tax that the property shall be within the territorial jurisdiction of the taxing power. Not only is the operation of state laws limited to persons and property within the boundaries of the State, but property which is wholly and exclusively within the jurisdiction of another State, receives none of the protection for

which the tax is supposed to be the compensation. This rule receives its most familiar illustration in the cases of land which, to be taxable, must be within the limits of the State. Indeed, we know of no case where a legislature has assumed to impose a tax upon land within the jurisdiction of another State, much less where such action has been defended by any court. It is said by this court in the *Foreign-held Bond Case*, 15 Wall. 300, 319, that no adjudication should be necessary to establish so obvious a proposition as that property lying beyond the jurisdiction of a State is not a subject upon which her taxing power can be legitimately exercised.

"The argument against the taxability of land within the jurisdiction of another State applies with equal cogency to tangible personal property beyond the jurisdiction. It is not only beyond the sovereignty of the taxing State, but does not and cannot receive protection under its laws. True, a resident owner may receive an income from such property, but the same may be said of real estate within a foreign jurisdiction. Whatever be the rights of the State with respect to the taxation of such income, it is clearly beyond its power to tax the land from which the income is derived. As we said in *Louisville &c. Ferry Co.* v. *Kentucky*, 188 U. S. 385, 396: 'While the mode, form and extent of taxation are, speaking generally, limited only by the wisdom of the legislature, *that power is limited by a principle inhering in the very nature of constitutional Government, namely, that the taxation imposed must have relation to a subject within the jurisdiction of the taxing Government.*' See also *McCulloch* v. *Maryland*, 4 Wheat. 316, 429; *Hays* v. *Pacific Mail S. S. Co.*, 17 How. 596, 599; *St. Louis* v. *Ferry Co.*, 11 Wall. 423, 429, 431; *Morgan* v. *Parham*, 16 Wall. 471, 476. . . . .

"The arguments in favor of the taxation of intangible property at the domicil of the owner have no application to tangible property. The fact that such property is visible, easily found and difficult to conceal, and the tax readily collectible, is so

cogent an argument for its taxation at its *situs*, that of late there is a general consensus of opinion that it is taxable in the State where it is permanently located and employed and where it receives its entire protection, irrespective of the domicil of the owner. We have, ourselves, held in a number of cases that such property permanently located in a State other than that of its owner is taxable there. *Brown* v. *Houston*, 114 U. S. 622; *Coe* v. *Errol*, 116 U. S. 517; *Pullman's Car Co.* v. *Pennsylvania*, 141 U. S. 18; *Western Union Telegraph Co.* v. *Massachusetts*, 125 U. S. 530; *Railroad Company* v. *Peniston*, 18 Wall. 5; *American Refrigerator Transit Co.* v. *Hall*, 174 U. S. 70; *Pittsburg Coal Company* v. *Bates*, 156 U. S. 577; *Old Dominion Steamship Company* v. *Virginia*, 198 U. S. 299. . . . .

"The adoption of a general rule that tangible personal property in other States may be taxed at the domicil of the owner involves possibilities of an extremely serious character. *Not only would it authorize the taxation of furniture and other property kept at country houses in other States or even in foreign countries.* . . . but of that enormous mass of personal property belonging to railways and other corporations which might be taxed in the State where they are incorporated, though their charters contemplated the construction and operation of roads wholly outside the State, and sometimes across the continent, and when in no other particular they are subject to its laws and entitled to its protection."

In the actions brought to recover the tax for 1910, the complaints allege a certain regulation of the Treasury Department, probably for the purpose of suggesting that foreign-built yachts owned by Americans are entitled to some special right or privilege. But there is no law of the United States which authorizes the Secretary of the Treasury to extend any special right or privilege to foreign-built yachts owned by American citizens, and, of course, the

action of the Treasury Department cannot make these yachts American vessels or classify them otherwise than Congress has done. *White's Bank* v. *Smith*, 7 Wall. 646, 655, 656. The declaration of the Treasury Department that foreign-built yachts belonging to American citizens are entitled to protection as their property, means no more and has no other effect than if the Department of State were to issue an order to the United States consuls abroad that American citizens owning and using any real or personal property in foreign lands are entitled to have such property protected by the foreign government under whose jurisdiction such property is.

In these two cases of Bennett and Goelet, the court is not considering a direct tax on citizens, such as a tax on their income from whatever source (*Pollock* v. *Farmers' Loan & Trust Co.*, 157 U. S. 429; 158 U. S. 601), nor any form of capitation tax, but solely a tax on the *use* of a particular kind of personal property permanently located in a foreign country and there *used* by citizens there domiciled. Such use of property is protected by the foreign government in whose jurisdiction the property is used or located, and is subject, of course, to the full tax and regulating power of that country. The principles of international comity may entitle the United States to demand fair treatment of its citzens abroad and freedom from unjust discriminations; but they do not warrant interference in taxation or the imposition of a tax on property located in the foreign jurisdiction. Yet the Government's argument, if we correctly apprehend its tendency, in final analysis advances the extreme and entirely novel idea in taxation that the United States could tax

the use of real property in France or England owned by any citizen of the United States there domiciled.

In the cases involving Mr. Billings' use of his yacht, it appeared that he had not used the yacht within the waters or territorial jurisdiction of the United States for as much as six months during either of the years 1909 and 1910 (No. 66, p. 6; No. 67, p. 10). The same principle, although to a lesser degree should govern in this instance. In other words, *use* in a foreign jurisdiction ought not to be taxable by the national or state governments.

But, conceding for the sake of the argument that Congress has the power to tax the use of foreign-built yachts which are owned and used outside of the United States by American citizens permanently residing abroad, the question nevertheless remains whether it has expressed the intention so to do. This point is presented for decision by questions II and III certified by the Circuit Court of Appeals in Nos. 630, 631 and 632. Such a tax would be a most unusual exaction and of a kind, it is believed, heretofore unknown in the history of federal taxation. Under such circumstances, more than ordinary clarity of expression should reasonably be expected and required of Congress. If Congress intended to compass the imposition of such a novel tax burden, the duty devolved upon it to express the intent to do so in plain terms, free from doubt or ambiguity. *Eidman* v. *Martinez*, 184 U. S. 578, 583. As was said in *Lynch* v. *Union Trust Co.*, 164 Fed. 161, 163:

> "In this connection it is necessary to keep in view a cardinal principle, to be applied generally to the

> interpretation of legislation whereby the government seeks to impose a duty or burden upon the property or rights of the citizen in the nature of taxation, and more especially applicable to statutes such as this, seeking to impose a burden of a special or unusual character, and that is that, in all cases of doubt or ambiguity arising on the terms of such a statute, every intendment is to be indulged against the taxing power."

Section 37 of the act of August 5, 1909, fails to reveal any legislative intent to accomplish the levy of the tax upon yachts used in foreign jurisdictions and its language is not adapted or appropriate to the achievement of that end. So the matter appeared to Circuit Judge Noyes in the trial court, who discussed it as follows (190 Fed. 368, 369):

> "Such a tax would be extraordinary in its nature. If imposed it should be by clear and express enactment. It ought not to depend upon any doubtful construction. If Congress desire to exercise the power of the national government to go beyond its territorial jurisdiction in levying taxes—a power inherent in the United States because it is a nation and more than a state—it ought to employ language leaving no doubt as to its intention. The presumption should be that a tax law applies only to subjects within the territorial jurisdiction. Although Congress might provide for the grant of documents to foreign-built yachts owned by citizens which would have great protective value, the steps which it has taken in that direction have been slight and the passports which it has provided for are granted only to vessels departing from the United States. The statute uses broad language, but I find nothing in it or in prior legislation clearly evidencing an intention on the part of Congress to tax the use of foreign-built yachts in foreign waters and wholly outside the limits of the United States. The provisions are, in my opinion, consistent with an intention to

tax only the use of such yachts in the waters of this country. . . .

"Furthermore, whatever doubt there might be as to the application of the statute in the case of a citizen of the United States residing in this country and owning a foreign-built yacht used only in foreign waters, there can be no question, in my opinion, that a citizen domiciled in a foreign country and owning such a yacht is not liable to the tax. Certainly the liability of a citizen domiciled and resident in France for the use of a foreign-built yacht in foreign waters should be established by clear and certain language, and in this case it is not only doubtful whether the statute applies to such use, but its language is inconsistent with its application to non-residents. The section in question provides that the tax shall be levied and collected 'by the collector of customs nearest the residence of the managing owner.' Who is the collector of customs nearest the residence of the defendant Goelet? Is it the collector of the most eastern district in Maine because that district is nearest to Paris? It seems evident from this provision alone that Congress considered that it was dealing with, and intended only to deal with, yacht owners residing in this country."

When Congress recently determined to levy an income tax on citizens residing abroad, it expressed its intention in perfectly plain language. Thus, in the act of Congress, approved October 3, 1913 (sec. II, A, subd. 1), it is declared that the tax shall be collected upon income accruing "to every citizen of the United States, whether residing at home or abroad, and to every person residing in the United States." In this respect Congress merely followed the practise exemplified in earlier legislation of similar character. Sec. 27, act of August 15, 1894 (28 Stat. 553, c. 349); sec. 49, act of August 5, 1861 (12 Stat. 309, c. 45); sec. 90, act of July 1, 1862 (12 Stat. 473, c. 119).

IV.

SECTION 37 SHOULD NOT BE CONSTRUED AS RETROSPECTIVE SO AS TO TAX THE USE OF FOREIGN-BUILT YACHTS DURING THE YEAR 1909.

The power of Congress to enact an annual tax law which shall include part of the year before its enactment need not be challenged; but it is contended that if Congress intends that a tax law shall operate retrospectively, settled rules applicable to the interpretation of tax laws and tax procedure require that such intention shall be plainly declared. For example, in section 38 of the same act of August 5, 1909, it is expressly provided that the corporation income tax shall be payable in respect of the whole calendar year 1909, although seven months of the year had already elapsed, and the same is true of the act of October 3, 1913, providing for the new income tax on individuals as well as corporations. Section II, subdivisions D and G, paragraph c. These express provisions were inserted in recognition of the rule that otherwise it would be presumed that Congress did not intend the tax law to have a retrospective effect.

Section 37 of the act of August 5, 1909, provides that the tax "shall be levied and collected *annually on the first day of September* by the collector of customs . . . upon the *use* of every foreign-built yacht, . . . *now or hereafter owned or chartered for more than six months* by any citizen or citizens of the United States," etc. This tax is an *annual* tax upon the *use* of a foreign-built yacht and plainly does not accrue and become payable unless the vessel has been "owned or chartered for more than six months" prior to the time when the tax is levied.

Section 37 does not refer to any use prior to the enactment of the law, and there is nothing in the ordinary meaning of its language to indicate any intention on the part of Congress to impose the tax upon prior use. It may be that this was an oversight, but such oversights in tax legislation cannot be supplied by construction.

It is a principle of law as it is of justice in taxation that one who has owned property, or exercised or enjoyed a right or privilege, or carried on a vocation, at a time and under circumstances when such ownership or acts were not taxable, ought not to be subjected to a special, novel and extraordinary tax by a subsequent statute operating retroactively upon his past ownership or acts. A citizen ought not to have a demand thus created against him in respect of past transactions by mere legislative edict. Ownership of property may be taxed as of a certain date or license fees may be required as of a certain date and be measured by past transactions, but generally such taxes are payable in advance. *People ex rel. N. Y. C. & H. R. R.R. Co.* v. *Gaus*, 200 N. Y. 328, 330. In the cases at bar, however, we are not dealing with any such subject matter, for Congress has imposed a "tax upon the *use*," and not upon ownership as of a particular date. The contention of the Government, if adopted, would practically require the court to reconstruct the language of the act so as to read that the tax "shall be levied and collected on the first day of September upon the use of every foreign-built yacht then owned or chartered."

The fact that Congress did not leave any doubt in respect of the retroactive effect of section 38 of the same act, should have a most persuasive bearing upon the

matter in hand. It was there provided in so many words that the corporation income tax should be "computed . . . for the year ending December thirty-first, nineteen hundred and nine, and for each calendar year thereafter" (36 Stat. 114), while no such provision was made in section 37 imposing the tax upon the use of foreign-built yachts. If Congress had intended that the annual tax on use created in section 37 should relate to use prior to August 5, 1909, it had ample opportunity to say so, and it would have expressed that intention as clearly as it did in the analogous connection in section 38. Its silence upon the point in section 37, therefore, indicates that it did not intend that the new tax on the use of foreign-built yachts should be retrospective; or, stated in other language, its silence indicates that it had probably no *intention* upon that point.

The general rule is that a tax should not be levied upon past ownership so as to cover a period when the property was not subject to taxation. *People* v. *Trust Co. of America*, 205 N. Y. 74, 77. *A fortiori*, a statute imposing a tax upon *use* should not be construed retrospectively unless the language imperatively requires it.

In the recent case of *U. S. Fidelity Co.* v. *Struthers Wells Co.*, 209 U. S. 306, 314, the court used the following language:

> "There are certain principles which have been adhered to with great strictness by the courts in relation to the construction of statutes as to whether they are or are not retroactive in their effect. The presumption is very strong that a statute was not meant to act retrospectively, and it ought never to receive such a construction if it is susceptible of any other. It ought not to receive such a construc-

> tion unless the words used are so clear, strong and imperative that no other meaning can be annexed to them or unless the intention of the legislature cannot be otherwise satisfied."

In the leading case of *United States* v. *Heth*, 3 Cranch 399, 413, the court said:

> "Words in a statute ought not to have a retrospective operation, unless they are so clear, strong, and imperative, that no other meaning can be annexed to them, or unless the intention of the legislature cannot be otherwise satisfied. This rule ought especially to be adhered to, when such a construction will alter the pre-existing situation of parties, or will affect or interfere with their antecedent rights, services, and remuneration; which is so obviously improper, that nothing ought to uphold and vindicate the interpretation, but the unequivocal and inflexible import of the terms, and the manifest intention of the legislature."

In *People ex rel. P. S. L. Assur. Soc.* v. *Miller*, 179 N. Y. 227, 180 N. Y. 525, 526, the facts somewhat resembled those presented in the cases at bar. The legislature of the State of New York, by section 187, chapter 118, laws of 1901, which became a law on March 16, 1901, and took effect on October 1, 1901, imposed upon insurance companies, "an annual state tax for the privilege of exercising corporate franchises or for carrying on business in their corporate or organized capacity within this state equal to one per centum on the gross amount of premiums received during the preceding calendar year for business done in this state." By section 194, the tax was made due and payable into the state treasury on or before June 1 of each year. The act was held to apply only to *business done in the calendar year following the*

enactment. Judge O'Brien, writing the opinion of the court, said (p. 230):

> "The statute under which the tax was imposed had no existence until October 1st, 1901. It speaks only from that day, and of future transactions of the company. That was the day on which the statute commenced to operate upon the relator, and no tax can be imposed upon any business transacted prior to that day. The statute is not in terms retroactive, but clearly prospective in its operation. No law can properly be held retroactive unless so expressed. In the absence of such clear declaration laws operate only in the future and upon future transactions. If there was no other guide the first day of October, 1901, was the day fixed by the statute for the relator to commence to pay. (*People ex rel. Mutual Trust Co.* v. *Miller*, 177 N. Y. 51.) But by plain implication the legislature fixed that day three months after the law went into operation; that is to say, on January 1st, 1902, since it provided for an annual tax calculated for the *calendar year.* The calendar year referred to in the statute must necessarily mean the first calendar year occurring after the law took effect; that is to say, the year 1902. The calendar year 1901 could not have been intended, since that would make the law retroactive—a construction that is always avoided, unless clearly expressed—and the tax would react on the privilege during nine months when no law for taxing the relator was in existence. The first calendar year, therefore, for which the tax was to be imposed was the year commencing January 1st, 1902. Thus construed the law is clear, natural and not violative of any priniciple of law or equity applicable to the exercise of the taxing power."

In *Metz* v. *Hagerty*, 51 Ohio St. 521, the court considered a statute entitled "An act to tax the business of trafficking in cigarettes or cigarette wrappers," passed April 24, 1893, to take effect August 1, 1893. An assess-

ment was to be made annually, returns were to be made on or before the third Monday in May in each year, and payments were to be semi-annual, June 20 and December 20. It was held that the tax was not effective for the year 1893, the court saying (p. 527):

> "The assessment is in contemplation of the statute to be an annual assessment, that is, for a whole year from January 1, to December 31. The statute did not take effect until the first day of August, 1893, when only five months of the year remained. The statute is in effect the same as if it had been passed on August 1st, to be in force from and after its passage. As the time for making the returns by the assessors and the assessments by the auditors, and the June payment to the treasurer, was long past before the law took effect, it cannot be inferred, without a clear provision to that effect, that the legislature intended that an act so penal in its nature, should have the effect to impose an assessment for seven months of the year, before the law was in force."

See also *United States* v. *Burr*, 159 U. S. 78, 82; *United States* v. *American Sugar Co.*, 202 U. S. 563, 577; *Holliday* v. *City of Atlanta*, 96 Ga. 377, 23 S. E. 406; *Young* v. *Town of Henderson*, 76 N. Car. 420; Lewis' Sutherland on Statutory Construction (2nd ed.), vol. II., p. 640.

However, if it be held that it must be presumed that Congress intended that the obligation to pay the tax should begin to accrue from the date when the act took effect, namely, from August 5th, 1909, then it is submitted that this *annual* tax on *use* should be apportioned according to the period of actual use during the year ending September 1, 1909, while the tax law was in force and operation. In *People ex rel. Mutual Trust Co.* v. *Miller*, 177 N. Y. 51, 54, 56, the Court of Appeals dealt with an analogous situation arising under the New York tax laws,

and used language which, it is submitted, may well be applied to the tax law now before this court, viz.:

> "The tax under consideration is not imposed upon property, but upon a privilege . . . It is imposed 'for the privilege of exercising' the corporate franchise . . . It is an 'annual' tax, imposed 'annually,' as the statute expressly provides, for the privilege of exercising, not of possessing, a corporate franchise. This privilege was used by the relator for only six days during the fiscal year in question. It could not exercise its franchise for the entire year, because the state did not bring it into existence until the year had nearly expired. The consideration for the tax is the privilege of carrying on business, yet the relator, according to the requirement of the comptroller, was compelled to pay for a privilege that it did not have and could not exercise during the greater part of the period for which the tax was laid. It used the privilege for only six days, but it is taxed for using it 365 days, during 359 of which it did no business and enjoyed no privilege. An annual tax is a tax reckoned by the year the same as annual rent or annual interest. An 'annual' tax imposed 'annually,' means a tax that is imposed once a year, *computed by the year*. If a trust company does not commence business until six days before the fiscal year ends, or if it ceases to do business six days after the year begins, the tax for doing business by the year requires apportionment. While the legislature did not so provide in express terms, it is a fair and reasonable implication from the words used that such was its intention. . . .
>
> "Statutes should receive a reasonable construction unless the language used prevents it. Here we have an act which does not expressly provide for the case before us. It imposes annually an annual tax for doing business, but does not say whether, if business is done for only part of a year, the tax shall be fixed in accordance with the time business is done, or for the entire year, including that part when not only no business was done, but there was

no right to do any. It would be unreasonable to hold that a tax on doing business covers the whole year, when business was done for only six days. A tax is presumed to be laid by the state in return for some proportionate value received by the taxpayer, and the legislature, in imposing an annual tax for the privilege of doing business, intended, as we think, that it should be based upon the period that the privilege was extended and enjoyed.

"We may assume that the question is not free from doubt, for we cannot unite in judgment upon it, but serious doubt in a case of taxation should be resolved in favor of the taxpayer. (*Matter of Harbeck*, 161 N. Y. 211, 217; *Matter of Fayerweather*, 143 N. Y. 114, 119; *Powell* v. *Tuttle*, 3 N. Y. 396, 401.) A statute which levies a tax is to be construed most strongly against the government and in favor of the citizen. The government takes nothing except what is given by the clear import of the words used, and a well-founded doubt as to the meaning of the act defeats the tax. (Sutherland on Statutory Construction, 458; Black's Interpretation of Laws, 326; Cooley on Taxation, 200.)

"We think the construction adopted is fair to the government and just to the citizen, for it gives the former full payment for the time the franchise was exercised and takes from the latter nothing but what it impliedly agreed to pay when it accepted the franchise."

To the same effect is *People ex rel. Lincoln Trust Co.* v. *Glynn*, 132 App. Div. 546, 547, affirmed on the opinion below in 198 N. Y. 501, and distinguished in *People ex rel. N. Y. C. & H. R. R.R. Co.* v. *Gaus*, 200 N. Y. 328, 331, upon grounds which reaffirmed and emphasized the decision in the *Mutual Trust Company* case.

Applying this reasoning to section 37 of the act of August 5, 1909, we find that the foreign built yacht tax is an excise duty imposed not upon property but upon use, that it is an annual tax, levied and collected "annually,"

that it did not come into existence until August 6, 1909, and that the Government now seeks to collect the tax for 365 days ending on September 1, 1909, during 340 of which the tax did not exist at all. The act of Congress should receive a reasonable construction, and it would be unreasonable to hold that an annual tax upon the *use* of a particular kind of personal property was intended to operate retrospectively for more than eleven months and to cover the entire tax year when only a few days of the taxable use were possible before the tax year came to an end.

The annual tax levied by the act of Congress of August 5, 1909, should, therefore, be held not to apply to any use of a yacht between August 6 and September 1, 1909, and to operate only from the year beginning September 1, 1909; but if this be not the true construction, then in any event the tax should be apportioned. This would be in accordance with a well reasoned judicial precedent and would be fair to the Government and the citizen alike. Under this latter view, the defendants would be liable for only 6.85 per cent. of the annual tax of seven dollars per gross ton leviable as of September 1, 1909.

V.

THE GOVERNMENT IS NOT ENTITLED TO RECOVER INTEREST.

The Circuit Court of Appeals has certified to the court the following question (Nos. 623 and 625, fol. 2; Nos. 624 and 626, fol. 3):

> "Is the United States entitled to recover interest upon the tax imposed upon the use of foreign-built yachts in and by section 37 of the Tariff Act of August 5, 1909?"

In the Pierce and Billings cases, which involved the tax for 1909, Circuit Judge Noyes sustained demurrers to the defendants' answers, and judgment was thereupon entered in favor of the Government for the amount of the tax, but its application for the allowance of interest from September 1st, 1909, the date when the tax was held to be payable, was denied, the court saying (not reported or to be found in any record):

> "Taxes are exactions for the support of the Government. They are not necessarily debts, although an action in the nature of debt may lie to enforce the duty to pay them. The tax statute may require the payment of interest upon overdue taxes; but if it failed to do so the common law rule is that interest is not recoverable.
>
> "The yacht tax statute, unlike other federal tax statutes, does not provide for the payment of interest, and I cannot perceive any reason why the general rule should not be applicable in these cases.
>
> "The judgments may be resubmitted without any provisions for the recovery of interest."

Actions to recover the taxes of 1910 were thereafter tried before District Judge Hough without a jury, and he followed Judge Noyes' decision, but rendered no opinion upon the question of interest.

Section 37 of the act of August 5, 1909, not only creates a special and peculiar tax liability of an unusual character and amount, but it makes no provision for interest or for a penalty of any kind for non-payment of the tax as and when due, and no statutory provision for interest or penalty is made applicable to it. This omission is significant. The imposition of interest as a penalty for delay in payment of taxes finds innumerable illustrations in state and federal legislation, and Congress must be pre-

sumed to have been aware, when it enacted this particular provision, that whenever it had previously intended to impose interest as a penalty for delay in the payment of a tax, it invariably so provided in express terms. For example, Congress has dealt with the subject of interest in connection with taxes, or analogous obligations, in cases of internal revenue taxes (R. S. sec. 3184), of bonds given for duties (sec. 963), of balances due to the Post Office Department (sec. 964), of the tax on railroad dividends (14 Stat. 138, 139), etc. In the face of these specific instances of enactments by Congress on the subject of interest, commencing more than a century ago, it should not be within the province of the courts now to impose the penalty of interest when Congress itself has omitted to do so, whether intentionally or inadvertently. The omission of such a penalty may not be supplied by judicial legislation, and it would be nothing less than judicial legislation for the courts to add interest where Congress has not required it. "The burden of a tax should not be increased by the addition of interest unless such a purpose of the legislature has been clearly expressed." *Hartford* v. *Hills*, 75 Conn. 599, 600. "What the State omitted to demand, the court cannot require." *People* v. *Gold & Stock Tel. Co.*, 98 N. Y. 67, 80.

As we have seen above, Congress will be presumed to know that in imposing taxes it is particularly bound to express its intention with unmistakable clearness. The court said in *Eidman* v. *Martinez*, 184 U. S. 578, 583:

> "We have ourselves had repeated occasion to hold that the customs revenue laws should be liberally interpreted in favor of the importer, and that the intent of Congress to impose or increase a tax upon

imports should be expressed in clear and unambiguous language. *Hartranft* v. *Wiegmann*, 121 U. S. 609; *American Net & Twine Co.* v. *Worthington*, 141 U. S. 468; *United States* v. *Wigglesworth*, 2 Story, 369; *Powers* v. *Barney*, 5 Blatchford, 202."

In *Spreckels Sugar Refining Co.* v. *McClain*, 192 U. S. 397, 416, the court referred to the well-settled rule that the citizen is exempt from taxation unless the same is imposed by clear and unequivocal language, and that where the construction of a tax is doubtful, the doubt is to be resolved in favor of those upon whom the tax is sought to be laid. And these principles have recently been declared to govern the interpretation of the act of August 5, 1909. *Mutual Benefit Life Ins. Co.* v. *Herold*, 198 Fed. 199, 201, aff'd 201 Fed. 918; *Parkview Building & Loan Assn.* v. *Herold*, 203 Fed. 876, 880.

But in the present cases there is no need to invoke these principles, because the act of August 5, 1909, bears upon its face unmistakable evidence that Congress did not intend to exact interest as a penalty for delay in payment of the tax. The foreign-built yachts tax is imposed in and by section 37. In the very next section provision is made for the corporation income tax, and there Congress expressly made section 3184 of the Revised Statutes, which provides for an interest penalty in connection with internal revenue taxes, applicable to the new corporation income tax by enacting that all laws relating to the collection of internal revenue taxes should apply to the corporation income tax (36 Stat. 117). If, therefore, Congress had intended that the tax imposed by section 37 should include a penalty for interest for delay in payment, or that section 3184 of the Revised Statutes should

apply, it had equal occasion to say so, and it would have similarly expressed its intention in clear language. Its silence must be conclusive that it did not intend that the new tax on the use of foreign-built yachts should include an interest penalty for delay in payment. *Expressio unius est exclusio alterius. People* v. *C. P. R.R. Co.*, 105 Cal. 576, 595, affirmed 162 U. S. 91. Under such circumstances, the court should not imply an intention to impose the penalty of interest.

The overwhelming weight of authority is that courts may not find an intention to impose interest as a penalty for delay in payment of taxes and cannot award interest on taxes unless there be some express statutory provision to that effect. There is no statutory provision which authorizes the imposition of interest as a penalty for delay in the payment of the tax levied in and by section 37 of the Tariff Act of August 5, 1909, and hence no interest can now be exacted. Numerous cases supporting this doctrine are to be found in the books. Among others are the following: *Crabtree* v. *Madden*, 54 Fed. 426, 431; *People* v. *Gold & Stock Tel. Co.*, 98 N. Y. 67, 79; *City of Rochester* v. *Bloss*, 185 N. Y. 42, 52; *City of Camden* v. *Allen*, 26 N. J. L. 398, 399; *Town of Belvidere* v. *Warren R. Co.*, 34 N. J. L. 193, 199; *Road Commissioners* v. *Freeholders*, 44 N. J. L. 570, 571, aff'd 45 N. J. L. 173; *Brennert* v. *Farrier*, 47 N. J. L. 75; *Shaw* v. *Peckett*, 26 Vt. 482, 486; *Hughes* v. *Kelley*, 69 Vt. 443, 445; *Perry* v. *Washburn*, 20 Cal. 318, 350; *People* v. *C. P. R. R. Co.*, 105 Cal. 576, 595, aff'd 162 U. S. 91; *Sargent & Co.* v. *Tuttle*, 67 Conn. 162, 167; *Hartford* v. *Hills*, 72 Conn. 599; *Crom-*

well v. *Savage*, 85 Conn. 376, 377; *Stitt* v. *Stringham*, 55 Ore. 89, 94; *State* v. *Mutual Life Ins. Co.*, 175 Ind. 59, 85; *State* v. *Southwestern R.R. Co.*, 70 Ga. 11, 32, 33; *Georgia R.R. Co.* v. *Wright*, 124 Ga. 596, 618; 125 Ga. 589, 610, reversed on other grounds in 207 U. S. 127; *McWilliams* v. *Jacobs*, 128 Ga. 375, 378; *Louisville & N. R. Co.* v. *Commonwealth*, 89 Ky. 531, 538; *Illinois Cent. R. Co.* v. *Adams*, 29 So. 996, 997 (Miss.); *New Whatcom* v. *Roeder*, 22 Wash. 570, 575; *State* v. *New England Furniture Co.*, 107 Minn. 52, 53; *Perry County* v. *Railroad Co.*, 65 Ala. 391, 401; *Edmonson* v. *City of Galveston*, 53 Tex. 157, 161; *Western Union Tel. Co.* v. *State*, 55 Tex. 314, 319, reversed on other grounds in 105 U. S. 460; *Cave* v. *Houston*, 65 Tex. 619, 622; *Brooks* v. *State*, 58 S. W. 1032, 1035 (Tex.); *Rockland* v. *Ulmer*, 87 Me. 357, 361; *Danforth* v. *Williams*, 9 Mass. 324; *Greer* v. *Richards*, 3 Ariz. 227, 235; 1 Cooley on Taxation, 3rd ed., pp. 19, 20; 27 Am. & Eng. Encyc. of L., 2nd ed., p. 777; 37 Cyc. 1165.

The whole matter was well summarized in the recent case of *Sargent & Co.* v. *Tuttle, Collector*, 67 Conn. 162, 167, where the court said:

> "It will, we think, also be found true that whenever taxes have carried interest, either as such, or by way of penalty, it has been by virtue of some statutory provision to that effect. And this is as it should be. At best a tax is a burden, a necessary one it is true, but none the less a burden, imposed on the taxpayer without reference to his consent; and it seems reasonable to hold that any increase of that burden by way of penalty or otherwise, should be expressly made by the power which imposes it; and that until the legislative will to increase the burden by the addition of interest has been clearly expressed, interest should not be allowed."

In *Crabtree* v. *Madden*, 54 Fed. 426, 431, Circuit Judge Sanborn, speaking for the Circuit Court of Appeals for the Eighth Circuit, among other things, said:

> "The counsel for plaintiffs attempts to escape from this conclusion by the argument that this tax is a debt; that it arises upon an implied contract; that the court has jurisdiction to enforce such contracts, and hence of this action. This position is not tenable. Taxes are not debts. They do not rest upon contract, express or implied. They are imposed by the legislative authority without the consent and against the will of the persons taxed, to maintain the government, protect the rights and privileges of its subjects, or to accomplish some authorized, special purpose. *They do not draw interest*, are not subject to set-off, and do not depend for their existence or enforcement upon the individual assent of the taxpayers. *Meriwether* v. *Garrett*, 102 U. S. 472, 513; *Lane County* v. *Oregon*, 7 Wall. 71, 80; *In re Duryee*, 2 Fed. Rep. 68; *Peirce* v. *Boston*, 3 Mete. (Mass.) 520; *Perry* v. *Washburn*, 20 Cal. 318; *Webster* v. *Seymour*, 8 Vt. 135, 140; *Johnson* v. *Howard*, 41 Vt. 122, 125."

In the leading case of *City of Camden* v. *Allen*, 26 N. J. L. 398 (1857), the New Jersey Supreme Court used the following language:

> "A tax, in its essential characteristics, is not a debt, nor in the nature of a debt. A tax is an impost levied by authority of government, upon its citizens or subjects, for the support of the state. It is not founded on contract or agreement. It operates *in invitum*. *Peirce* v. *The City of Boston*, 3 Mete. 520. A debt is a sum of money due by certain and express agreement. It originates in, and is founded upon contract express or implied.
>
> "A debt universally bears interest from the time it is due. A tax never carries interest. No instance, it is believed, can be found since the formation of the government where a claim for interest on taxes has been made or enforced."

Mr. Justice Field, when Chief Justice of the Supreme Court of California, expressed himself thus in *Perry* v. *Washburn*, 20 Cal. 318, 350:

> "A tax is a charge upon persons or property to raise money for public purposes. It is not founded upon contract; it does not establish the relation of debtor and creditor between the taxpayer and State; it does not draw interest; it is not the subject of attachment; and it is not liable to setoff. It owes its existence to the action of the legislative power, and does not depend for its validity or enforcement upon the individual assent of the taxpayer. It operates *in invitum*."

Shaw v. *Peckett*, 26 Vt. 482, 486, is another leading case upon this subject, and in it the following appears:

> "There is no provision of the statute authorizing him to collect interest on taxes, of the persons against whom they are assessed, and we perceive no provision which subjects the collector to the payment of interest under such circumstances. The assessment of taxes does not create a debt . . . upon which a promise to pay interest can be implied. It is a proceeding purely *in invitum*. The existence of a contract, either express or implied, is the ground upon which interest is generally allowed."

The case of *State* v. *Mutual Life Ins. Co.*, 175 Ind. 59, 85, contains a similar ruling:

> "Taxes levied or imposed by the State are not debts in the ordinary acceptation of that term so as to make them bear interest under the general interest laws of the State. In the absence of any express declaration by the legislature that taxes shall bear interest, the latter, as authorities affirm, should not be allowed. A tax made payable by a statute at a certain time does not bear interest unless the statute so provides."

In *Stitt* v. *Stringham*, 55 Ore. 89, 94, the court quoted

with approval the following from Black on Tax Titles, 2nd ed., sec. 236:

> "Nothing but an express declaration of law that taxes shall bear interest will authorize the charging of interest upon them. It follows that if interest is included in the amount for which land is sold at tax sale, when no statute specifically authorizes it, the sale will be void."

The question was disposed of in the following manner in *Louisville & Nashville R.R. Co.* v. *Commonwealth*, 89 Ky. 531, 538:

> "Taxes are not debts within the legal meaning of the term. They are not based upon contracts, either express or implied. They come upon the taxpayer *in invitum*. Their payment is a duty which the citizen owes to the State in return for the protection it affords him and his property. Interest is not allowable upon them by the general law. The power to impose it must come from a statute. Although they are payable at a certain time, they do not carry interest unless the statute says so. It, upon the contrary, provides fixed penalties for their non-payment.
>
> "It was said by this court in the case of *Ormsby* v. *City of Louisville*, 79 Ky., 197, that interest is not allowable upon taxes by way of damages, and this rule has since been followed in *Louisville and Nashville Railroad Company* v. *Hopkins County*, 87 Ky. Rep. 605; *Kentucky Central Railroad Company* v. *Pendleton County, &c.*, 8 Ky. Law Rep. 517, and other cases."

In *Illinois Central R. Co.* v. *Adams*, 29 So. Rep. 996, 997 (Miss.), there is this discussion:

> "Can interest upon delinquent taxes be recovered upon an injunction bond by designating them as damages? If they can be thus recovered, they surely would be recoverable in a direct suit therefor. The basis for recovery must be the same in both in-

> stances. Calling interest 'damages' could not operate to make that liable which was not liable under the name of interest. Interest is entirely statutory. It was not allowable by the common law, and exists only by positive legislation . . . Unless the contractual relation exists, or judgment has been obtained, our statutes do not authorize the recovery of interest; and it is clear that that relation does not exist, as between the government and the citizens, regarding the levy of taxes, in the sense to which the interest statute refers."

The force of these authorities is not at all weakened by the fact that it has been held proper for the United States to sue for the recovery of taxes in an action in the nature of debt. *Meredith* v. *United States*, 13 Peters 486; *United States* v. *Chamberlin*, 219 U. S. 250. Such an action may be brought to recover sums which are not debts in any sense of the word. As said in the case last cited (p. 262), "whether an action of debt is maintainable depends not upon . . what manner the obligation was incurred, but it lies whenever there is due a sum either certain or readily reduced to certainty." The mere form of procedure cannot change the nature of the obligation or create a penalty for delay in payment. The court was careful to point out this distinction in *Meriwether* v. *Garrett*, 102 U. S. 472, 513, 514. There Mr. Justice Field said: "Taxes are not debts. It was so held by this court in the case of *Oregon* v. *Lane County* [7 Wall. 71] . . . Nor is their nature affected by the fact that . . an action of debt may be instituted for their recovery. The form of procedure cannot change their character." See also *Boston* v. *Turner*, 201 Mass. 190, 193; *Gautier* v. *Ditmar*, 204 N. Y. 20, 27.

In nearly all of the tax cases cited by the Government

in the court below, the question of interest was not before the court. *Litchfield* v. *County of Webster*, 101 U. S. 773; *United States* v. *Erie Railway Co.*, 106 U. S. 327; *Railroad Company* v. *United States*, 101 U. S. 543; *Arnold* v. *United States*, 9 Cranch 104; *Cheang-Kee* v. *United States*, 3 Wall. 320; *United States* v. *Cobb*, 11 Fed. 76; *United States* v. *Phelps*, 17 Blatchf. 312; *United States* v. *Dodge*, 1 Deady 124. In some of these cases, there was no assignment of error which presented the point; in others the amount of the interest was too trifling to invite controversy; in none of them was there any consideration of the subject either by the court or counsel, and in none was the court required to decide the point. The whole matter merely passed *sub silentio*. It is familiar law that cases in which a particular point is so passed are entitled to no weight whatever as authority upon that point. *Entick* v. *Carrington*, 19 How. St. Tr. 1029, 1068; *United States* v. *More*, 3 Cranch 159, 172; *New* v. *Oklahoma*, 195 U. S. 252, 256. In *Entick* v. *Carrington*, *supra*, Lord Chief Justice Camden answered the argument that certain "warrants ought to acquire some strength by the silence of those courts, which have heard them read so often upon returns without censure or animadversion," by saying "that as no objection was taken to them upon the returns, and the matter passed *sub silentio*, the precedents were of no weight." Chief Justice Marshall in *United States* v. *More*, *supra*, explained a prior decision thus: "No question was made, in that case, as to the jurisdiction. It passed *sub silentio*, and the court does not consider itself as bound by that case." If this rule thus applies to cases upon the ques-

tion of jurisdiction—a question which "the court is bound to ask and answer for itself, even when not otherwise suggested" (*M. C. & L. M. Ry. Co.* v. *Swan*, 111 U. S. 379, 382)—how much more strongly must it govern cases upon such a minor and incidental matter as interest upon taxes?

No importance, of course, can be attached to the case of *United States* v. *Washington Mills*, 2 Cliff. 601, 607, where interest was allowed "under the agreement of the parties"; and the case of *Dollar Savings Bank* v. *United States*, 19 Wall. 227, 231, cannot aid the Government because interest was there refused. *Arnold* v. *United States*, 9 Cranch 104, is pointless since that decision proceeded upon the act of March 2, 1799, c. 22, s. 65 (now sec. 963, R. S.), which expressly provided for the allowance of interest upon all bonds for duties.

In *Litchfield* v. *County of Webster*, 101 U. S. 773, the citizen tendered to the state treasurer the amount of the taxes together with interest thereon, which the latter refused to receive because he claimed more (see p. 779). The court was not called upon to say whether Litchfield could or should have offered even less than he did. Litchfield was willing to pay interest and there was, therefore, no controversy on that score. Under such a state of facts, it cannot be presumed that the court intended, unnecessarily and without consideration, to make a ruling wholly opposed to the weight of authority.

If *People* v. *County of New York*, 5 Cowen 331, affords any support to the contention that interest can be imposed for delay in payment of taxes by a New York court in the absence of a statute to that effect, then it must be

considered as having been overruled by the subsequent decisions of the Court of Appeals in *People* v. *Gold & Stock Tel. Co.*, 98 N. Y. 67, 79, and *City of Rochester* v. *Bloss*, 185 N. Y. 42, 52. In fact, the case in Cowen's reports was cited to the court in *People* v. *Gold & Stock Tel. Co.*, 98 N. Y. at p. 72, and it was nevertheless ruled that taxes do not draw interest in the absence of statute, and this decision was approved and reaffirmed in *City of Rochester* v. *Bloss, supra,* where the court used the following language:

> "In *People* v. *Gold & Stock Tel. Co.* 98 N. Y. 67) this court said: 'The State at its pleasure created the charge or tax and prescribed the penalty for default in payment. No other can be collected . . . Interest is not given either by this act or by any general law of the State. The payment of it cannot be imposed by implication. What the State omitted to demand the court cannot require.'
>
> "Taxes being mere statutory impositions do not bear interest at common law. Nor do statutes providing for interest on debts, contracts and judgments apply to taxes. (Am. & Eng. Enc. of Law [2nd ed.], vol. 27, p. 777.)
>
> "In Cooley on Taxation (3rd ed. p. 19), referring to taxes, it is said: 'They do not draw interest, as do sums of money owing upon contract, but only when it is expressly given.' "

But there is in fact no conflict between the New York cases. In *People* v. *County of New York,* the county as agent for the state had collected certain state taxes. For the county to withhold these taxes was a conversion or breach of trust, and it has been frequently held that such misconduct on the part of an agent or trustee subjects him to liability for interest. *Town of Lyons* v. *Chamberlain,* 25 Hun 49, aff'd 89 N. Y. 578; *Bischoffsheim* v. *Baltzer,* 21 Fed. 531. It does not, however, follow from this

doctrine that interest is due on taxes for delay in payment where no relation of trust or agency exists between the parties and the liability is being litigated in good faith.

In some of the cases cited in the court below by the Government in support of its claim for interest, the cause of action was based on an implied contract or other common law right, and interest was awarded as damages. *Redfield* v. *Ystalyfera Iron Co.*, 110 U. S. 174, 176; *Young* v. *Godbe*, 15 Wall. 562; *New Dunderberg Mining Co.* v. *Old*, 97 Fed. 150. These cases did not involve, as do the cases at bar, any question of legislative intent. The courts found that there had been an unlawful detainer of the plaintiff's property and hence gave interest as compensation and as part of the damages. They did not have to consider whether Congress intended that interest should be collected or whether there was any statutory authority for the collection of interest. In the present case, the question is whether Congress intended that that should be done and adequately expressed its intention. That explains why Circuit Judge Sanborn in the *New Dunderberg Mining Company* case declared that interest was collectible even in the absence of statutory authority in the case of a wilful conversion and detention of the plaintiff's property as part of the damages sustained, and yet ruled in *Crabtree* v. *Madden, supra*, that interest could not be recovered upon taxes if there was no express statute which awarded it. This court held in *National Bank of the Commonwealth* v. *Mechanics' Nat. Bank*, 94 U. S. 437, that the depositors' proofs of claim operated to make them the

equivalent of judgments, and that as such interest was allowable upon them. That case, of course, presents no analogy whatever to the cases at bar.

There remains the case of *United States* v. *Mexican International R. Co.*, 154 Fed. 519, the only case, we believe, which affords support to the claim of the Government. It is an ill-considered decision. It confuses cases founded upon ordinary debts or common law liability for damages with tax cases which depend exclusively upon statute and legislative intent. As above shown, no analogy as to interest exists between them. Further, the court failed to recognize that taxes, although recoverable in actions of *indebitatus assumpsit*, are not debts, thus entirely ignoring the rulings of this court in *Meriwether* v. *Garrett*, 102 U. S. 472, 513, and *Lane County* v. *Oregon*, 7 Wall. 71, 79, 80. Finally, it did not distinguish, and so far as appears, did not even consider, any of the multitude of authorities, decided by most respectable and learned tribunals, which squarely hold that interest is not incidental to taxes in the absence of statute. In deference to these cases and to the prior decision of the Circuit Court of Appeals of another circuit in *Crabtree* v. *Madden*, 54 Fed. 426, 431, the lower court in the *Mexican International Railroad* case should have refrained, as a matter of judicial comity, from making the decision it did. *Wells* v. *Oregon Ry. & N. Co.*, 15 Fed. 561, 570; *Fairfield Floral Co.* v. *Bradbury*, 87 Fed. 415, 417.

CONCLUSION.

For the foregoing reasons the following are submitted as sound conclusions:

1. That the classification made by section 37 of the act of Congress of August 5, 1909, is in conflict with the Fifth Amendment.

2. That use of a foreign-built yacht within the jurisdiction is the measure and test of liability.

3. That citizens permanently resident and domiciled in foreign countries, there using foreign-built yachts of which the situs is in a foreign country, are not liable to pay the tax.

4. That the tax is prospective and does not apply to use prior to the enactment of the law.

5. That the Government is not entitled to recover interest in addition to the tax.

The approval by the court of these several contentions will not in any way embarrass the Federal Government, or deprive it of any legitimate source of income. The classification point simply requires equality and justice as among members of the same class, that is, those using yachts under identically similar conditions, and avoids the discrimination against the yacht owners now before the court simply because of the origin of their property. The requirement of actual use within the jurisdiction accords with the language and intention of Congress. The exclusion of foreign-built yachts wholly used abroad, having their legal situs abroad and owned by citizens permanently residing abroad, is not only fair and just but is required by settled principles in the law governing taxation and tax procedure. The fact that

Congress has repealed the tax pending this litigation and after the decision below, seems to indicate its disapproval of the novel theory upon which the act proceeded. And the point of interest is based upon the soundest of reasoning, which recognizes that taxation is essentially a legislative function, that the legislative body must expressly impose any and all penalties or exactions attached to taxes, and that nothing can be added by implication. There is surely no embarrassment to the Government or mere technicality in the rule that if Congress intends to impose interest as a penalty for the failure to pay taxes on any specified date, it must express that intention in plain and unmistakable language.

New York, December 15, 1913.

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Of counsel for various owners of foreign-built yachts.

INDEX.

	Page.
STATEMENT	2
The statute	2
The facts	3
The questions	6

ARGUMENT.

First. Construction of the act	7
I. The Tax Was Due September 1, 1909	7
A. The act so construed is not retroactive	8
B. Even if such construction does give the statute a retroactive effect, it is clear that Congress intended the tax to be paid September 1, 1909	12
1. Congress has the power to lay a retrospective tax	12
2. The language of this act shows a clear intention to make it immediately effective	13
3. The length of ownership is immaterial; the phrase "for more than six months" qualifies only charters and not ownership	14
C. The tax can not be apportioned	17
II. The Tax Is Upon Consumption or Upon the Privilege of Using, and Is Not Avoided by Failure to Employ the Yacht on Cruises	18
A. The language of the act	19
B. Its reasonable construction	22

First. Construction of the act—Continued. Page.

III. THE TAX APPLIES TO EVERY FOREIGN-BUILT YACHT BELONGING TO A CITIZEN OF THE UNITED STATES, THOUGH SUCH CITIZEN BE DOMICILED AND RESIDENT ABROAD AND THE YACHT HAS ACQUIRED A PERMANENT SITUS ABROAD 23

1. The language of the act is plain 24
2. The practicable interpretation of the act ... 29

Second. The constitutional questions 30

I. THE ANNUAL TAX IS AN EXCISE AND IS UNIFORM THROUGHOUT THE UNITED STATES. GEOGRAPHICAL UNIFORMITY IS THE ONLY LIMITATION IMPOSED BY THE CONSTITUTION. THIS LIMITATION BEING OBSERVED, THE TAX DOES NOT AMOUNT TO DEPRIVATION OF PROPERTY WITHOUT DUE PROCESS OF LAW, EVEN IF, IN ITS OPERATION, IT BE FOUND INTRINSICALLY UNEQUAL. AND THE PRESENT TAX WOULD BE VALID EVEN WERE THE "EQUAL PROTECTION OF THE LAWS" CLAUSE OF THE FOURTEENTH AMENDMENT APPLICABLE 30

1. Admittedly, the tax is an excise 30
2. The only constitutional limitation respecting indirect taxes is that they "shall be uniform throughout the United States." (Art. I, sec. 8, cl. 1.) This tax is geographically uniform, and does not deprive the yacht owners of their property without due process of law, even though other owners of yachts are not taxed 31
3. The classification of the statute is reasonable within the "equal protection of the laws" clause of the fourteenth amendment 38

Second. The constitutional questions—Continued. Page.

II. The United States May Tax the Use of Yachts Owned by Its Citizens, even though Such Citizens are Domiciled Abroad and their Yachts have a Foreign Situs 44

1. The position of yacht owners is rested upon certain decisions of this court holding that protection is a condition of taxation 44

2. Under the reasoning of these cases the United States as a nation may tax all property of its nonresident citizens 47

3. But it is unnecessary to press the argument to this extent. These yachts are territory of the United States and receive peculiar protection 48

4. The right to tax may be supported by analogy to the right of a nation to punish its citizens for crimes committed abroad 50

III. The 35 Per Cent Duty 52

IV. Section 37 is not Unconstitutional, Because it Originated in an Amendment First Proposed in the Senate 53

Third. Miscellaneous questions 53

I. The Yacht of Mr. Rainey is Liable to the Tax Notwithstanding the Treaty of July 3, 1815, with Great Britain 53

II. Suit in Personam Lies to Recover the Duty 54

III. The United States is Entitled to Interest on the Several Taxes From the Time They Became Due 54

Conclusion 59

ALPHABETICAL LIST OF CASES CITED.

	Page.
Adams v. *Milwaukee*, 228 U. S. 572	44
American Sugar Refining Co. v. *Louisiana*, 179 U. S. 89	44
Armour Packing Co. v. *Lacy*, 200 U. S. 226, 235	42
Ayer & Lord v. *Kentucky*, 202 U. S. 409	44, 45
Barrett v. *Indiana*, 229 U. S. 26, 30	41
Brown v. *Houston*, 114 U. S. 622	11
Cheang-Kee v. *United States*, 3 Wall. 320	57
Chicago Dock & Canal Co. v. *Fraley*, 228 U. S. 680, 686	41
Citizens' Telephone Co. v. *Fuller*, 229 U. S. 322	40
Connolly v. *Union Sewer Pipe Co.*, 184 U. S. 540, 562	42
District of Columbia v. *Brooke*, 214 U. S. 138, 149–150	38
Eidman v. *Martinez*, 184 U. S. 578, 583, 591	26, 28
Fennell v. *Pauley*, 112 Iowa 94	11
Flint v. *Stone Tracy Co.*, 220 U. S. 107, 108, 143, 166	13, 21, 34, 53
Frellsen v. *Mahan*, 21 La. Ann. 79, 103	9
Hammock v. *Loan & Trust Co.*, 105 U. S. 77, 84	15
Hardesty Bros. v. *Fleming*, 57 Tex. 395	11
Hudson v. *Miller*, 10 Kans. App. 532	11
Hylton v. *United States*, 3 Dall. 171	21
Johnson v. *Southern Pacific Co.*, 196 U. S. 17	24
Johnston v. *United States*, 17 Ct. Cls. 157, 171	9
Knowlton v. *Moore*, 178 U. S. 41, 81–83	22, 31
Lamb v. *Powder River Live Stock Co.*, 132 Fed. 434	13
Lindsley v. *Natural Carbonic Gas Co.*, 220 U. S. 61, 78	41
Litchfield v. *County of Webster*, 101 U. S. 773	58
Litson v. *Smith*, 68 Mo. App. 397, 402	11
Locke v. *New Orleans*, 4 Wall. 172	9, 12
McClellan v. *Railroad*, 11 Lea (Tenn.) 336	9, 18
McClean v. *Arkansas*, 211 U. S. 539, 547	42
McCoach v. *Minehill Ry. Co.*, 228 U. S. 295	19
McCray v. *United States*, 195 U. S. 27	34
Meredith v. *United States*, 13 Peters 486	57
Metropolis Theater Co. v. *City of Chicago*, 228 U. S. 61, 69	41

	Page.
Missouri, K. & T. Ry. Co. v. *United States*, 231 U. S. 112	22
Mutual Loan Co. v. *Martell*, 222 U. S. 225	41
Patton v. *Brady*, 184 U. S. 608	34
Pauley Jail Building & Mfg. Co. v. *Crawford County*, 84 Fed. 942	14
People v. *County of New York*, 5 Cowen 334	56
People v. *Spring Valley Hydraulic Gold Co.*, 92 N. Y. 383, 390	9
Pickett v. *United States*, 216 U. S. 456, 461	17
Pollock v. *Farmers' Loan & Trust Co.*, 157 U. S. 429	20
Quong Wing v. *Kirkendall*, 223 U. S. 59	42
Railroad Company v. *Rose*, 95 U. S. 78, 80	13
Railroad Company v. *United States*, 101 U. S. 550	57
Rochester v. *Bloss*, 185 N. Y. 42, as reported in 6 L. R. A. N. S. 694	55
St. John v. *New York*, 201 U. S. 633	44
Second Employers' Liability cases, 223 U. S. 1, 52–53	40
Southern Pacific Co. v. *Kentucky*, 222 U. S. 63	45, 46
State ex rel. v. *Certain Lands*, 40 Ark. 34	11
Stephens v. *Cherokee Nation*, 174 U. S. 445, 480	13, 15
Stockdale v. *Ins. Companies*, 20 Wall. 323, 331	12
The Alta, 136 Fed. 513	50
The Conqueror, 166 U. S. 119	50
The Miranda, 47 Fed. 815, affirmed C. C. A., 2d Cir., 51 Fed. 523	50
Travellers' Ins. Co. v. *Connecticut*, 185 U. S. 364	43
Union Transit Co. v. *Kentucky*, 199 U. S. 194	44, 45
United States v. *Chamberlin*, 219 U. S. 250, 258, 263	26, 54
United States v. *Cobb*, 11 Fed. 76	57
United States v. *Delaware & Hudson Co.*, 213 U. S. 366	39
United States v. *Dodge*, 1 Deady, 124	57
United States v. *Erie Railway Co.*, 106 U. S. 327, 330	48, 58
United States v. *Lyman*, 1 Mason, 482	57
United States v. *Mexican International Ry. Co.*, 154 Fed. 519	57
United States v. *Singer*, 15 Wall. 111	21
Wildenhus's case, 120 U. S. 1, 12	49
Young v. *Godbe*, 15 Wall. 562, 565	56

TEXT BOOKS.

	Page.
Beale, Criminal Pleading and Practice, p. 2	50
Clark and Marshall on Crimes (2d ed.), pp. 737, 743, 744	49, 50, 51
Cooley on Taxation (3d ed.), 492, 494	13
Endlich, Interpretation of Statutes, sec. 280	9
2 Moore, International Law, pp. 255, 256, et seq	49, 51

THE YACHT TAX CASES.

In the Supreme Court of the United States.

OCTOBER TERM, 1913.

H. CLAY PIERCE, PLAINTIFF IN ERROR, *v.* UNITED STATES.	Nos. 64, 65.
CORNELIUS K. G. BILLINGS, PLAINTIFF in error, *v.* UNITED STATES.	Nos. 66, 67.
ROY A. RAINEY, PLAINTIFF IN ERROR, *v.* UNITED STATES.	Nos. 73, 74.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

UNITED STATES *v.* H. CLAY PIERCE.	Nos. 623, 624.
UNITED STATES *v.* CORNELIUS K. G. BILLINGS.	Nos. 625, 626.

UNITED STATES v. ROY A. RAINEY.	Nos. 627, 628.
UNITED STATES v. JAMES GORDON BENNETT.	Nos. 629, 630.
UNITED STATES v. HARRIET GOELET.	Nos. 631, 632.

ON CERTIFICATES FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR THE UNITED STATES.

STATEMENT.

These cases present questions involving the construction and constitutionality of section 37 of the tariff act of August 5, 1909 (36 Stat., 112), imposing a tax upon the use of foreign-built yachts owned by citizens of the United States.

THE STATUTE.

> There shall be levied and collected annually on the first day of September by the collector of customs of the district nearest the residence of the managing owner, upon the use of every foreign-built yacht, pleasure boat, or vessel, not used or intended to be used for trade, now or hereafter owned or

chartered for more than six months by any citizen or citizens of the United States, a sum equivalent to a tonnage tax of seven dollars per gross ton.

In lieu of the annual tax above prescribed the owner of any foreign-built yacht, pleasure boat, or vessel above described may pay a duty of thirty-five per centum ad valorem thereon, and such yacht, pleasure boat, or vessel shall thereupon be entitled to all the privileges and shall be subject to all the requirements prescribed by sections forty-two hundred and fourteen, forty-two hundred and fifteen, forty-two hundred and seventeen, and forty-two hundred and eighteen of the Revised Statutes and acts amendatory thereto in the same manner as if said yacht had been built in the United States, and shall be subject to tonnage duty and light money only in the same manner as if said yacht had been built in the United States.

So much of section five of chapter two hundred and twelve of the laws of nineteen hundred and eight, approved May twenty-eighth, nineteen hundred and eight, as relates to yachts built outside of the United States and owned by citizens of the United States is hereby repealed.

This section shall not apply to a foreign-built vessel admitted to American registry.

THE FACTS.

Ten suits are involved in the proceedings here. Five were brought to recover the tax due Septem-

ber 1, 1909, upon the yachts of Messrs. Pierce, Billings, Rainey, and Bennett and Mrs. Goelet. The other five suits were to recover the tax due September 1, 1910, on the same yachts.

The yachts were built in England, and were purchased by their present owners between 1896 and 1908; they are pleasure boats, not used or intended to be used in trade.

All the owners are citizens of the United States. Messrs. Pierce, Billings and Rainey are residents thereof and domiciled therein. Mr. Bennett and Mrs. Goelet are domiciled in and residents of France.

The bill of sale for each yacht was duly recorded in the office of the collector of customs at New York or Boston. By authority of art. 62 of the Customs Regulations (adopted under section 4190, R. S. U. S.) the collector issued a certificate to each yacht owner that the bill of sale was valid, and that the purchaser was a citizen of the United States. This certificate was either endorsed upon the bill of sale, as in the Goelet case (R. 632, p. 2), or was in the form of a commission for a pleasure yacht, as in the Billings case (R. 67, p. 19).

The yachts *Vanadis*, belonging to Mr. Billings, and *Cassandra*, belonging to Mr. Rainey, were in active service during the greater part of the two years prior to September 1, 1910, in both domestic and foreign waters, the larger portion of this period being spent in domestic waters (No. 67, p.

20; No. 73, pp. 20, 21). During these two years Mr. Pierce's yacht, the *Yacona*, was out of active commission lying at her berth in Brooklyn and not immediately ready for sea. Pierce could have used her on cruises had he so desired, and he did keep on board of her a master and a few men to look after her (R. 65, p. 19).

The yacht *Lysistrata*, belonging to Mr. Bennett, has not been in the waters of the United States since 1901, except for periods of less than a month in each of the years 1903, 1904, 1906, 1907, and 1908. Each year, however, the yacht was used in cruises on the high seas and in foreign waters. Her headquarters have been at Beaulieu in the south of France (R. 630, p. 3).

The yacht *Nahma*, belonging to Mrs. Goelet, has not been in American waters since 1901, but each year has been used for periods of from six to nine months in foreign waters and upon the high seas (R. 632, p. 3).

Upon these facts the Circuit Court entered judgments in favor of the Government for the amount of the tax, but without interest, against Pierce, Billings, and Rainey for the taxes due September 1, 1909, and September 1, 1910. Judgments against the United States were entered in the cases against Bennett and Goelet, the court holding that the statute did not apply to their yachts. The suits for the 1909 tax were decided on demurrer to the answer. In the suits for the 1910 tax there was a trial be-

fore the circuit judge and the judgments were entered on his findings of fact and of law.

Messrs. Pierce (Nos. 64 and 65), Billings (Nos. 66 and 67), and Rainey (Nos. 73 and 74) brought the judgments directly to this court. In the same cases the Government took writs of error to the Circuit Court of Appeals on the question of interest, which question that court has certified here (Nos. 625 to 628).

The United States also sued out writs of error to the Court of Appeals in the Bennett and Goelet cases, and all the questions in them have been certified here (Nos. 629 to 632).

THE QUESTIONS.

The questions presented involve both the meaning and constitutionality of the statute. They will be discussed as follows, considering first the construction and then the validity of the act.

First.—Questions of Construction.

I. The tax is an excise upon the present use of vessels, and was due on the 1st day of September, 1909, and each first day of September thereafter.

II. The tax is upon consumption, and it is immaterial whether the owner employs his yacht in pleasure cruises or permits it to rust out.

III. The statute imposes the tax upon the use of every foreign-built yacht owned by any United States citizen, even though such citizen be domiciled and resident abroad, and the yacht has acquired a permanent situs abroad.

Second.—Constitutional Questions.

I. The annual tax is an excise and is uniform throughout the United States. It is subject to no limitation other than that of geographical uniformity, and therefore does not deprive the yacht owners of their property without due process of law.

II. The United States may tax the use of yachts owned by its citizens, though such citizens are domiciled abroad and the yachts have a foreign situs.

III. The 35 per cent duty.

IV. The section is not invalid because it originated in an amendment proposed in the Senate.

Third.—Miscellaneous Questions.

I. The yachts are subject to the tax, notwithstanding the fact they were built in England.

(*a*) The yachts here are not English vessels within the meaning of the treaty.

(*b*) If inconsistent with the statute, the treaty is repealed.

II. Suit *in personam* lies.

III. The United States is entitled to interest on the taxes from the date of their levy.

ARGUMENT.

FIRST.

CONSTRUCTION OF THE ACT.

I. THE TAX WAS DUE SEPTEMBER 1, 1909.

The act was approved August 5, 1909.

The yacht owners, arguing that statutes are not to have a retroactive construction in cases of doubt,

contend that the tax was not due until September 1, 1910. Our contention is that the act took effect from its passage, and imposed a tax on every September 1st thereafter until its repeal.

A. *The act so construed is not retroactive.*

The tax is an excise laid upon the *use* of foreign-built yachts. There is nothing in the section to indicate that the use so taxed is past use, rather present or future use. The assumption that the tax is based upon use for the year preceding its collection is therefore wholly gratuitous. The tax may as well be considered prospective as retrospective. But, in truth, as we contend, the tax is on the present use, regardless of its extent in time.

Even on the theory of the yacht owners that ownership for more than six months by a citizen of the United States is an essential prerequisite to the imposition of the tax, a year's use is obviously not contemplated by the act. But if, as we shall endeavor to show, the phrase "for more than six months"[1] does not apply to ownership but only to charters, nothing in the act suggests that past use is the basis of the tax.

Yet assuming for the moment that six months' *ownership* must be shown, it does not at all follow that the tax is retroactive if levied on September 1, 1909. It may still be upon present *use*. For "a statute is not retrospective in the sense under con-

[1] The effect of the phrase "for more than six months" is considered hereafter.

sideration because a part of the requisites for its action is drawn from a time antecedent to its passing." Endlich, Interpretation of Statutes, §280; *Johnston* v. *United States,* 17 Ct. Cl. 157, 171.

The principle is exemplified in *Locke* v. *New Orleans,* 4 Wall. 172. A Louisiana statute enacted in 1850, authorizing each of the municipalities of the city of New Orleans to "levy a tax on capital on the assessment roll for the year 1848, and * * * for the year 1849" was attacked as retroactive and therefore void.

This court overruled the contention, saying:

> In the first place the act was not subject to the imputation of being retrospective. It did not operate upon the past, or deprive the party of any vested rights. It simply authorized the imposition of a tax according to the previous assessment (p. 173).

People v. *Spring Valley Hydraulic Gold Co.,* 92 New York 383, 390; *Frellsen* v. *Mahan,* 21 La. Ann. 79, 103, accord.

In taxes upon real and personal property the annual tax is collected from the owner of the property at the time the tax is due without regard to whether he has owned it for a year or for only a day preceding the levy. The law is well stated in *McClellan* v. *Railroad,* 11 Lea (Tenn.) 336. The defendant's statutory exemption from taxation expired on March 28, 1877. The general tax law provided that all property should be assessed to the owner on April 1. Accordingly, defendant's prop-

erty was assessed on that date for the whole year. Defendant sought to prorate the assessment for the balance of the year after the expiration of its exemption. The court dealt with this attempt as follows:

> We think this is not the true principle in such a case. It goes on the theory that taxes are a burden accruing and accumulating from the first of January of one year to the same period of the next. On the contrary, the theory of the statute is that it is a gross sum to be ascertained at the period fixed, as the result of an assessment or valuation then made, and this gross sum is to be charged or assessed to the owner or reputed owner at this date. The fact that the property owned, or reputed to be owned, by a party on that day had by law been specially exempt from this burden in this case can make no difference, as far as we can see, any more than would have been the case had the owner bought property in another State on the 28th of March, and then for the first time brought it into the county or had owned property in another State up to this period and then brought it to his residence in this State. In both and all the cases the law exempted it from taxation or, at any rate, in the latter cases, it was not subject to taxation by our law; yet it is clear such property would be assessable for taxation after the first quarterly court in April, and to the owner or reputed owner on the first day of April of that year (p. 338).

See also *State ex rel.* v. *Certain Lands,* 40 Ark. 344; *Litson* v. *Smith,* 68 Mo. App. 397, 402.

The rule is illustrated by cases in which cattle have been brought into the State for feeding purposes shortly before the date fixed for the assessment or levy, have remained but a few months, and yet have been compelled to pay the annual tax upon personal property levied under the laws of the State. *Fennell* v. *Pauley,* 112 Iowa 94; *Hudson* v. *Miller,* 10 Kans. App. 532; *Hardesty Bros.* v. *Fleming,* 57 Tex. 395.

In *Brown* v. *Houston,* 114 U. S. 622, this principle was carried to its extreme. Coal mined in Pennsylvania, in which State the annual tax for 1880 was paid, was shipped to New Orleans to be sold in the open market for the shippers. After arrival it was sold from the original vessel, without being landed, and for the purpose of being taken out of the country by foreign-bound vessels. An annual tax in Louisiana for the year 1880 upon this coal was sustained.

It is true that in these cases the tax was a direct one. Counsel for the yacht owners contend that another rule of construction applies to an indirect tax like the present. But we are unable to see any reason for this distinction. The ordinary tax is imposed upon the owner at a particular time irrespective of the length of ownership. So here the tax is upon the present use of the property, whether that use has endured for a year or for a day. True

the tax is called an annual one, but so is the direct property tax. This means only that the tax is to be collected once a year; when one tax has been paid another may not be collected for a year.

It is true that in some cases of an excise upon an occupation, franchise, or income, where the measure of the tax is the amount of business, profits, or income during the preceding year, it has been held that the tax is upon the exercise of the business or receipt of the income and is leviable only upon business done after the passage of the act unless the contrary intention of the legislature is clearly expressed. But the principle of those statutes is not applicable here. They levy an excise upon the entire year's business, and that business is the measure of the tax. This excise is upon the present use of the vessel, and the measure of the tax is not the length of ownership, the value of the vessel, nor the profits derived from it. The measure is the tonnage of the vessel, a present fact easily ascertainable at the time of the levy without regard to the last year's history of the vessel.

B. *Even if such construction does give the statute a retroactive effect, it is clear that Congress intended the tax to be paid September 1st, 1909.*

1. It can not be seriously questioned that Congress has the power to lay a retrospective tax.

Locke v. *New Orleans,* 4 Wall. 172.

Stockdale v. *Ins. Companies,* 20 Wall. 323, 331.

Railroad Co. v. *Rose,* 95 U. S. 78, 80.
Flint v. *Stone Tracy Co.,* 220 U. S. 108.
Cooley Taxation (3d Ed.), 492–494.

Nor can it be doubted that courts will construe a statute restrospectively when that is clearly the legislative intent. *Stephens* v. *Cherokee Nation,* 174 U. S. 445. As was said by Judge (now Mr. Justice) Van Devanter in *Lamb* v. *Powder River Live Stock Co.* (C. C. A. 8th C.), 132 Fed. 434:

> The rule that statutes are to be given a prospective, rather than a retrospective, operation is well recognized; but, like other rules of interpretation, it is resorted to to give effect to the presumed and reasonably probable intention of the legislature, when the terms of the statute do not of themselves make the intention certain or clear, and can not be invoked to change or defeat the intention when it is made obvious or manifest by the terms of the statute (p. 436).

2. The language of this act shows a clear intention to make it immediately effective.

The law, speaking as of August 5, 1909, imposes a tax on the use of yachts "*now or hereafter owned.*" The use of the word "now" is significant and seems determinative. It contemplates an immediate levy according to present ownership, and is inconsistent with the notion that Congress intended the collection of the tax to be postponed until September 1, 1910, more than a year after its enactment. There is no room for construction; Congress has expressed its intention in plain terms.

Similar language received a retrospective construction in *Pauley Jail Building Mfg. Co.* v. *Crawford County* (C. C. A. 8th C.), 84 Fed. 942:

> It is true that there is another question presented in the briefs submitted in this case—the question whether or not the act of the Legislature of Arkansas of 1893 was intended to have a retrospective effect. This question, however, is entitled to very little consideration in view of the fact that the proviso reads: "That no judgment rendered or to be rendered shall bear any interest after the passage of this act." The use of the word "rendered" is a demonstration of the intention of the legislature to make this proviso applicable to judgments which had then been entered (p. 943).

Congress could have had no object in postponing the collection of this tax for over a year. The section was part of the tariff act of 1909, designed to provide revenue for the current fiscal year. Section 42 of that act declares:

> That unless otherwise specially provided this act shall take effect on the day following its passage. (36 Stat. 118.)

The yacht owners virtually ask for the suspension of this provision for one year so far as §37 of the act is concerned.

3. The length of ownership is immaterial; the phrase "for more than six months" qualifies only charters and not ownership.

The yacht owners rely upon this phrase in support of their position that the tax is not due in 1909. Otherwise the phrase is clearly immaterial here, for each of the owners involved purchased his yacht at least a year before September 1, 1909.

On the face of the section, and disregarding for the moment its reason, there is some slight ambiguity in the language used. The words—

> upon the use of every foreign-built yacht * * * now or hereafter * * * owned or chartered for more than six months by any citizen or citizens of the United States

might conceivably be held to require ownership for more than six months as a prerequisite to liability. A slight change in punctuation, however, would entirely destroy the plausibility of this construction; and punctuation is to be given little weight in determining the legislative intent. *Hammock* v. *Loan and Trust Co.*, 105 U. S. 77, 84; *Stephens* v. *Cherokee Nation*, 174 U. S. 445, 480. As a moment's reflection will show, a reasonable construction of the section requires that the six months' period apply only to charters and not to ownership.

As applied to charter parties, the phrase has an entirely just and proper object, i. e., to subject to the tax yachts chartered for a term long enough to be regarded as temporary ownership for purposes of taxation, and thus to prevent the evasion of the tax by means of long-term leases, at the same time exempting contracts of hire for the short period of

six months or less. To the suggestion that six months is an arbitrary test of the nature of the charterer's possession, it may be answered that any term selected by Congress would have seemed equally arbitrary. Six months' use is not an unreasonable measure of taxability.

But applied to ownership, the six months' phrase would be not only irrational and without apparent purpose; it would also create a wholly arbitrary and unjust discrimination between owners. On each September 1st it would exempt yachts acquired within six months, or, if construed merely to require over six months' unbroken ownership by any citizen of the United States, would exempt yachts frequently transferred, while taxing other yachts exactly similar in all other respects even though their present owners might have acquired them immediately before the first of September. And speaking as of August 5, 1909, it would exempt for the first year all recently acquired yachts, while taxing yachts acquired more than six months before its enactment.

Again, this construction would render evasion of the tax comparatively easy. To keep a yacht free from the tax each successive owner need only take care not to have title for more than six months. By passing rapidly from hand to hand the yacht could remain continually exempt; and this although its successive owners were all citizens of the United States. In short, the act would put a premium on transfers within the six months period.

A further discrimination would be introduced by the words "now or hereafter." A yacht "now or hereafter *chartered* for more than six months" means, according to the natural purport of the language, a yacht subject to a charter-party of more than six months' duration at the passage of the act or any time thereafter. In levying the tax it would only be necessary for the collector to ascertain whether the yacht in question was so chartered at the time of levy, regardless of whether or not the requisite six months had passed. But as applied to yachts *owned,* the collector would have to look back and determine whether six months' ownership had elapsed before the date of collection; for obviously a yacht can not be said to be owned for six months until the expiration of the six months period. Here then is another discrimination in favor of owners and against charterers of yachts—the very opposite of the distinction which Congress might reasonably have been expected to make.

A construction which leads to such absurd and unjust consequences is to be avoided if possible. *Pickett* v. *United States,* 216 U. S. 456, 461, and cases cited.

C. *The tax can not be apportioned.*

The yacht owners suggest that if the tax be held payable on September 1, 1909, this court should apportion it to the fraction of a year during which the law had been in effect upon that date. New

York cases are cited in which the court did so apportion the tax on corporate franchises. It is difficult to discover on what principle of statutory construction this result was reached when the statute under consideration said nothing about apportionment. See *McClellan* v. *Railroad, supra.*

But at all events those cases have no application here, where the tax is imposed, not upon a franchise measured by a year's business, but upon present use. If the tax be apportioned in 1909, the same reasoning would require that it be apportioned thereafter if on any September first the owner has not had the use for a full year. However fair and reasonable a provision for apportionment would have been, the fact remains that Congress did not see fit so to provide. According to Congress, the only measure of the tax is the tonnage of the vessel taxed. The insertion of a provision not contemplated by the legislature is obviously no part of the judicial function.

II. THE TAX IS UPON CONSUMPTION OR UPON THE PRIVILEGE OF USING, AND IS NOT AVOIDED BY FAILURE TO EMPLOY THE YACHT ON CRUISES.

This question concerns only the *Yacona,* belonging to Mr. Billings. The court found that this yacht was laid up out of commission at her berth in Brooklyn from October 1, 1907, to September 1, 1910, and was not navigated during that period; that Mr. Billings could have so used her had he desired, and that he did keep a master and a few men on board her.

The yacht necessarily deteriorated during this inaction, and we think that this consumption was within the statute.

A. *The language of the act.*

The tax is to be levied upon the *use* of foreign-built yachts. Nothing is said about the extent or kind of use required. The question then is, Does the word "use," without more, indicate that Congress contemplated active employment of the yacht for the pleasurable purposes of navigation or cruising before the tax could be collected?

If the word is to be construed in its popular sense, the owner may fairly be said to have had the "use" of his yacht as it lay at anchor, or even while it was laid up at the dock and out of commission. If he has not chosen to avail himelf of that potential use, that is his own business; the fact should not be held to exempt him from a tax payable in terms by *every* citizen of the United States who owns a foreign-built yacht.

The yacht owners cite, by way of analogy, *McCoach* v. *Minehill Ry. Co.*, 228 U. S. 295, a case arising under the corporation tax law, embodied in section 38 of the act of August 5, 1909. The distinction between the two cases is obvious. The corporation tax law is laid upon "every corporation * * * engaged in business * * * with respect to the carrying on or doing business by such corporation," and its measure is "one per centum upon the entire net income over and above five thousand dollars received by it from all sources

during such year." The transaction of active business is the thing taxed; the income derived therefrom is included in the measure of the tax. Indeed, were it otherwise the tax would probably run counter to the decision of this court in *Pollock* v. *Farmers' Loan and Trust Co.*, 157 U. S. 429, and be held a direct tax upon property, although denominated a tax on the income of corporate business. The active participation in corporate business bears a necessary relation to the measure of the tax which leads irresistibly to the conclusion that Congress contemplated the taxation only of corporations thus engaged.

In the instant case, however, the measure of the tax is tonnage. While it can not be said that this measure has no relation to the utility or *usability* of the vessel as a pleasure craft—in other words, its potential use—it obviously bears none to the actual extent to which the yacht is engaged in cruising during a given period.

For this reason the contention of plaintiffs in error that a tax on potential use or the privilege of using is identical with a tax on ownership, and hence direct, is without substantial merit. The distinction between the two may be a narrow one; it is none the less clear. The privilege of using does not necessarily involve ownership, as the inclusion in the act of yachts chartered for more than six months shows. No more does ownership necessarily entail the privilege of using; the owner who has chartered his yacht to another, for example,

still has title but has parted with his power of beneficial user for a term, and during that term is free from the tax. The measure of the tax—tonnage, not value—has far more relation to usability than to ownership.

A privilege tax is not direct simply because measured by capacity for use. *Flint* v. *Stone Tracy Co.*, 220 U. S. 107, 166. In *United States* v. *Singer*, 15 Wall. 111, an excise tax upon the liquor business, although measured by a monthly output of not less than 80% of the total capacity of the distillery, was sustained as indirect, this court saying:

> Every one is advised in advance of the amount he will be required to pay if he enters into the business of distilling spirits, and every distiller must know the producing capacity of his distillery. If he fail under these circumstances to produce the amount for which by the law he will in any event be taxed if he undertakes to distill at all, he is not entitled to much consideration (p. 120).

In *Hylton* v. *United States*, 3 Dall. 171, a tax upon carriages *kept* for personal use or for hire, and measured solely by the size and character of the vehicle taxed, was held to be indirect. The court said:

> All taxes on expenses or consumption are indirect taxes; a tax on carriages is of this kind and of course is not a direct tax.

A passage from Adam Smith's Wealth of Nations is then quoted, defining an indirect tax as a

method of taxing people in proportion to their revenue by means of a tax on the consumable commodities upon which that revenue is expended (p. 180).

Economically, to be sure, the incidence of the present tax is upon the yacht itself or the pocketbook of its owner. Its legal incidence, however, is upon the privilege of using, and whether this be called a tax upon consumption, potential use, or capacity for use, it is indirect in the constitutional sense. *Knowlton* v. *Moore*, 178 U. S. 81–83.

The situation here presented is analogous to that considered by this court in *Missouri, K. & T. Railway Co.* v. *United States*, 231 U. S. 112. The question there was whether railroad employees, during the time they were waiting, doing nothing, while the engine was sent off for water and repairs, were "on duty" within the meaning of the hours of service act of March 4, 1907, 34 Stat. 1415. This court held they were, saying:

> They were, nevertheless, on duty when inactive. Their duty was to stand and wait.

And so in No. 65, the master and men of the steam yacht *Yacona* were on duty, and her owner had the use of her even while she was at her berth.

B. *Its reasonable construction.*

(1) The tax is primarily a revenue measure and secondarily designed to encourage the building of yachts in America. This being its purpose, Congress could have had no object in exempting yachts

out of commission during the whole year and taxing only those in active use.

(2) If it be admitted that actual use is necessary, the question arises, how much? If a yacht is used a single day in the year, is it taxable? Or must it be used the whole year or only the greater part thereof? The act is silent on this point; nor is there anything in it which renders the tax apportionable according to the amount of use per annum. "$7 per gross ton" is the tax imposed.

Let us take the case of recent transfers. To collect the tax need the Government show that the owner on September 1st has actually used the yacht, even if he has had it only a week? Or is he to be taxed because of such use by the previous owner?

These inquiries, to which the act affords no answer, furnish sufficient ground for concluding that Congress never meant to require actual use as a basis for the tax. Besides, as a practical matter, the collector could not have been expected—having other duties to perform—to inquire into the fact and extent of use in each individual case.

The privilege of use, as shown by ownership or a charter of more than six months, is the only test of liability imposed by the act.

III. THE TAX APPLIES TO EVERY FOREIGN-BUILT YACHT BELONGING TO A CITIZEN OF THE UNITED STATES, THOUGH SUCH CITIZEN BE DOMICILED AND RESIDENT ABROAD AND THE YACHT HAS ACQUIRED A PERMANENT SITUS ABROAD.

This point relates only to the yachts of Mr. Bennett and Mrs. Goelet. Question VI in the first

Goelet case (R. 631) indicates that her yacht, the *Nahma,* has acquired a situs abroad. This case arose on demurrer; in the second case (No. 632) which went to trial the findings of fact merely show that her yacht has not been in the United States since 1901, but has been used in cruises on the high seas and in foreign waters for from six to nine months each year, and when not in use is kept in Scotland (R. 632, p. 3).

There is no suggestion that the *Lysistrata,* Mr. Bennett's yacht, has acquired a foreign situs. It is found that her usual anchoring place is in the south of France, but that since 1901 she has been used on various cruises on the high seas and in foreign waters, and that in each of the years 1903, 1904, 1906, 1907, and 1908 she spent periods of less than a month in domestic waters, visiting numerous ports in this country (R. 630, p. 3).

1. *The language of the act is plain.*

It applies to the use of *every foreign-built yacht* owned or chartered by *any citizen* of the United States.

There is nothing ambiguous or uncertain in this language; there are no exceptions or reservations. Additional words would be mere repetition. There is thus no room for construction.

Every statute is to be construed sensibly and to accomplish the legislative intent. This is the rule even as applied to criminal statutes (*Johnson* v. *Southern Pacific Co.* 196 U. S., 17) and should ap-

ply also to taxing statutes. If these yachts were intended to be excluded from the apparently plain language of the statute, we might reasonably expect to find either in the congressional proceedings or in the statute itself some evidence of such intention.

The congressional proceedings, however, clearly indicate that Congress understood that the tax would apply to the specific yachts now involved. On August 4, 1909, the day before the adoption of the act, Senator Lodge asked leave to have printed in the Record a statement from the Commissioner of Navigation giving a list of yachts which would be affected by the new yacht tax and the probable revenue to be derived from that source. This list was headed by the *Lysistrata,* and included the *Nahma.* (44 Cong. Rec., Part V, 61st Cong., 1st sess., p. 4875.)

In the hearing before the House committee a list submitted December 22, 1908, by the Marine Supply Association of America included the *Nahma.*

Nor is the language of the statute itself any more helpful as indicating an intention to except these yachts. The statute provides that the tax shall be levied and collected " by the collector of customs of the district near the residence of the managing owner." The court below thought this expression indicated an intent to tax only citizens residing in the United States. But if such were the intention the more apt phrase would have been " the collector of customs of the district *of which the managing owner is a resident.*" This was the language of the

inheritance tax involved in *Eidman* v. *Martinez*, 184 U. S., 591, of which this court said that it would be difficult to find language more expressive of an intent to confine the tax to persons domiciled in this country.

The present statute was undoubtedly drawn in view of the decision of this court in *Eidman* v. *Martinez*. The language here used, "district nearest the residence of the managing owner," applies even more appropriately to nonresidents than to persons residing in the United States. Every citizen of the United States comes within this description. There is a customs district nearest his residence the ascertainment of which is a mere matter of geography. It is immaterial whether New York is the nearest district. That fact is admitted by the demurrer in two of the suits. And the assessment by the statute is sufficient. *United States* v. *Chamberlin*, 219 U. S., 263.

In considering the various income-tax statutes—the only other Federal legislation taxing nonresident citizens—counsel on the other side points out that Congress specifically mentioned nonresident citizens whenever it was desired to tax them. An examination of the several statutes will show that in each instance there was an excellent reason for naming nonresident citizens.

For example, the original income-tax act of August 5, 1861 (12 Stat. 309), imposed a tax of 3% on the income of every person residing in the United States, and a tax of 5% upon the income of

every citizen residing abroad derived from property owned in the United States. The act left untaxed the income of such citizens from property without the United States.

The act of June 30, 1864 (13 Stat. 281), extended the tax to all citizens of the United States, whether residing at home or abroad and whether derived from property or employment in the United States or elsewhere.

Finally, Section II, A, subdivision 1, of the tariff act of October 3, 1913, imposes a tax not only upon the income of every citizen of the United States, whether residing at home or abroad, but also upon the income of every person residing in the United States and upon the income from all property owned in the United States by any person residing elsewhere.

This act exerts to the full extent the national power to tax incomes. It reaches all citizens wherever they may be, and alien residents, as well as alien nonresidents who derive income from property within the United States. It taxes two classes—citizens and aliens—and therefore gives a full description of each class. No one of the preceding statutes exerted the full power of Congress, and therefore it was necessary to describe in detail the citizens and residents intended to be taxed.

But in the statute under consideration Congress made no exceptions or reservations. It had one clearly defined class to deal with, namely, citizens owning or chartering foreign-built yachts, and it

used the simplest language possible, but language which clearly and unequivocally covered every citizen of the United States in the class intended to be reached.

There is no reason for reading into the statute the qualification contended for by the other side. As will be hereafter shown, the protection of the United States extends to its citizens throughout the world. This protection, of course, extends to Mr. Bennett and Mrs. Goelet and to their yachts, and they are entitled to fly the American flag. They have availed themselves of their right to record their ownership of these yachts in the United States customs house; and Mr. Bennett has constantly since 1903 entered American ports without paying light money required from foreign vessels and has thus saved himself thousands of dollars. And the protection which the United States may be called upon to extend to American-owned yachts constantly in foreign waters is much more likely to involve us in disputes with foreign nations than is the protection extended to yachts which are usually in domestic waters. It is unreasonable to say that Congress intended to exempt from this tax the use of such yachts.

Reliance is had by the other side on *Eidman* v. *Martinez*, 184 U. S. 578, 583. There it was held that the inheritance tax did not apply to the passing of intangible personal property, like bonds, though physically in the United States, which were owned by a citizen of Spain residing in that country and

which passed to his son, who was also a citizen and resident of Spain. That tax applied to property "passing by will or by the intestate law of any State or Territory." The Government sought to construe the word "State" to include a foreign country, but this court held that such words of exception confining the operation of the duty were to be liberally construed in favor of the taxpayer.

Here the United States merely asks that the language used be given its plain meaning, and that no words of exception be read into the statute under the guise of construction.

2. *The practicable interpretation of the act.*

By seeking to read exceptions into the statute we run into much the same difficulties as arose in considering the alleged requirement of actual use.

(*a*) If residence or domicile abroad exempts, the question that first arises is, which? Need a person have acquired a foreign domicile, or is foreign residence enough? Must he have resided abroad all of the year prior to the date of collection, or only a major portion thereof? Again, what if he maintains a residence in this country as well as abroad, but has not visited these shores within the year? Or suppose his home is abroad, but he has spent some time in this country, living at hotels, or visiting friends, or perhaps cruising in American waters on his yacht?

(*b*) Or if the presence of the yacht in our waters is essential, what is the requisite extent of that presence? A day? More than six months? The

whole year? The queries propounded above under the third point need not be reiterated here; they are all pertinent, however.

A yacht is often a craft designed for use on the high seas, capable of venturing on voyages to far-distant ports with almost as much impunity as the most modern ocean liner, and quite as safely as the average tramp steamer, or the best passenger vessel of a generation ago. If a sea-going yacht is so employed for a year or more, did Congress mean to exempt it from the tax? Or are yachts kept in, or sailing from, some foreign port alone exempt?

The act affords no answer to these questionings, once they have arisen. But they can never arise if the court confines itself to the language of the act, which makes no exceptions in favor of foreign-owned yachts or nonresident owners, but taxes *every* foreign-built yacht owned by *any* United States citizen.

SECOND.

THE CONSTITUTIONAL QUESTIONS.

I. THE ANNUAL TAX IS AN EXCISE, AND IS UNIFORM THROUGHOUT THE UNITED STATES. GEOGRAPHICAL UNIFORMITY IS THE ONLY LIMITATION IMPOSED BY THE CONSTITUTION. THIS LIMITATION BEING OBSERVED, THE TAX DOES NOT AMOUNT TO DEPRIVATION OF PROPERTY WITHOUT DUE PROCESS OF LAW, EVEN IF IN ITS OPERATION IT BE FOUND INTRINSICALLY UNEQUAL. AND THE PRESENT TAX WOULD BE VALID, EVEN WERE THE "EQUAL PROTECTION OF THE LAWS" CLAUSE OF THE FOURTEENTH AMENDMENT APPLICABLE.

1. *Admittedly, the tax is an excise.*

This is one proposition upon which all counsel agree. The tax is upon the use of the vessels, is a

tax upon consumption, and is indirect. *Hylton* v. *United States,* 3 Dall. 171.

2. ***The only constitutional limitation respecting indirect taxes is that they "shall be uniform throughout the United States."*** *(Art. I, sec. 8, cl. 1.)* ***This tax is geographically uniform and does not deprive the yacht owners of their property without due process of law, even though other owners of yachts are not taxed.***

Within recent years the proposition has been several times advanced to this court that an excise which is intrinsically unequal is void as depriving the taxpayers of property without due process of law.

In every such case it has been held that an excise requires only geographical uniformity, and that when this exists the tax is not a deprivation of property without due process of law, even though it apply unequally to different classes of taxpayers.

The first of these cases is *Knowlton* v. *Moore,* 178 U. S. 41. The court, speaking through the present Chief Justice, stated the opposing contentions as follows (p. 84):

> On the one side, the proposition is that the command that duties, imposts, and excises shall be uniform throughout the United States relates to the inherent and intrinsic character of the tax; that it contemplates the operation of the tax upon the property of the individual taxpayer and exacts that when an impost, duty, or excise is levied it shall oper-

ate precisely in the same manner upon all individuals; that is to say, the proposition is that "uniform throughout the United States" commands that excises, duties, and imposts, when levied, shall be equal and uniform in their operation upon persons and property in the sense of the meaning of the words "equal and uniform," as now found in the constitutions of most of the States of the Union. The contrary construction is this: That the words "uniform throughout the United States" do not relate to the inherent character of the tax as respects its operation on individuals, but simply requires that whatever plan or method Congress adopts for laying the tax in question, the same plan and the same method must be made operative throughout the United States; that is to say, that wherever a subject is taxed anywhere the same must be taxed everywhere throughout the United States, and at the same rate. The two contentions, then, may be summarized by saying that the one asserts that the Constitution prohibits the levy of any duty, impost, or excise which is not intrinsically equal and uniform in its operation upon individuals, and the other that the power of Congress in levying the taxes in question is by the terms of the Constitution restrained only by the requirement that such taxes be geographically uniform.

In discussing the question, the court pointed out that the principle of intrinsic equality and uni-

formity was inapplicable to indirect taxes and was nowhere applied to them at the time of the adoption of the Constitution (p. 84); the history of congressional legislation was given, showing that the rule of inherent uniformity had been disregarded, and the principle of geographical uniformity consistently enforced, and an illustrative list of early acts of Congress was given (pp. 92 to 95); and an examination of proceedings under the confederation, and of the debates at the time of the adoption of the Constitution showed that geographical uniformity was always understood (p. 95). The court concluded (p. 106):

> By the result, then, of an analysis of the history of the adoption of the Constitution it becomes plain that the words "uniform throughout the United States" do not signify an intrinsic but simply a geographical uniformity. And it also results that the assertion to which we at the outset referred, that the decision in the *Head Money cases*, holding that the word uniform must be interpreted in a geographical sense, was not authoritative, because that case in reality solely involved the clause of the Constitution forbidding preferences between ports, is shown to be unsound, since the preference clause of the Constitution and the uniformity clause were, in effect, in framing the Constitution, treated, as respected their operation, as one and the same thing, and embodied the same conception.

In *Patton* v. *Brady*, 184 U. S. 608, the court said:

> Geographical uniformity being therefore that only which is prescribed by the Constitution the courts may not add new conditions, and the statute in question fully complies with that requirement. It is not the province of the judiciary to inquire whether the excise is reasonable in amount, or in respect to the property to which it is applied. Those are matters in respect to which the legislative determination is final (p. 623).

In *McCray* v. *United States*, 195 U. S. 27, it was argued that the tax on oleomargarine amounted to a taking of property without due process of law. After deciding that the tax was an excise, the court said:

> The right of Congress to tax within its delegated power being unrestrained, except as limited by the Constitution, it was within the power of Congress to select the objects upon which an excise should be laid. It therefore follows that in exerting its power no want of due process of law could possibly result because that body chose to impose an excise on artificially colored oleomargarine and not upon natural butter artificially colored. The judicial power may not usurp the functions of the legislative in order to control that branch of the Government in the performance of its lawful duties (p. 61).

Finally in the Corporation Tax cases, *Flint* v. *Stone Tracy Company*, 220 U. S. 107, it was again urged that the tax was not uniform within the

meaning of the Constitution, and that it operated to deprive the corporations of their property without due process of law. The court said, through Mr. Justice Day:

> The Constitution contains only two limitations on the right of Congress to levy excise taxes; they must be levied for the public welfare and are required to be uniform throughout the United States. As Mr. Chief Justice Chase said, speaking for the court in *License Tax cases,* 5 Wall. 462, 471: "Congress can not tax exports, and it must impose direct taxes by the rule of apportionment and indirect taxes by the rule of uniformity. Thus limited, and thus only, it reaches every subject and may be exercised at discretion." The limitations to which the Chief Justice refers were the only ones imposed in the Constitution upon the taxing power (pp. 153, 154). * * *
>
> The limitation of uniformity was deemed sufficient by those who framed and adopted the Constitution. The courts may not add others (p. 154).
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> * * * * *
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> But, it is insisted, this taxation is so unequal and arbitrary in the fact that it taxes a business when carried on by a corporation and exempts a similar business when carried on by a partnership or private individual as to place it beyond the authority conferred upon Congress. As we have seen, the only limitation upon the authority conferred is uniformity in laying the tax, and uniformity

> does not require the equal application of the tax to all persons or corporations who may come within its operation, but is limited to geographical uniformity throughout the United States. This subject was fully discussed and set at rest in *Knowlton* v. *Moore*, 178 U. S. 41, *supra*, and we can add nothing to the discussion contained in that case (p. 158).

The present tax meets this requirement of *geographical* uniformity. It operates upon every citizen of the United States owning a foreign-built yacht, wherever such citizen may be found.

The only inequalities pointed out by counsel are that alien owners of foreign-built yachts and citizen owners of domestic-built yachts are not taxed. It may be remarked as to the first inequality that there is no evidence showing that any aliens in the United States own yachts; and if there be any such yachts, they are foreign territory, subject to the laws of their own country even while in our waters, and receive scant protection from the United States. As to the second inequality, it will be shown hereafter that important reasons exist for the classification.

The following extract from the brief of the late Solicitor General Bowers in the *Corporation Tax cases* (brief, 118, 119) conclusively sums up the argument on this point:

> Nor could the case well be stronger than it is for holding that the Constitution leaves all questions of tax uniformity to Congress,

if only the charge be what is a tax in the general conception of civilized nations and the kind of uniformity expressly required by the Constitution exist. In the first place, direct taxes, on the one hand, and duties, imposts, and excises, on the other hand, embrace all kinds of tax; and therefore the Constitution has applied an express rule of uniformity to every kind of Federal tax. In the second place, in all the controversy over the ratification of the Constitution the sufficiency of the expressly required uniformity in taxation does not seem to have been assailed. In the third place, when the amendments which grew out of the controversy over the ratification of the Constitution were adopted, no nearer approach was made to the subject of taxation than the provision about due process in the fifth amendment. It is inconceivable that, if anything more than was expressed in the Constitution was desired to assure uniformity of taxation, some specific language on that subject, or at least some direct reference to the topic of taxation, would not have been inserted in the amendment. Finally, in the course of the proposal and adoption of all subsequent amendments to the Constitution the original treatment of taxation has been left unchanged.

A practical answer, at any rate, has been given by this court to this question of the exclusiveness of the rule of geographical uniformity as to Federal excises. In no case has a congressional classification of persons

> or things for taxation been adjudged improper. The kinds of Federal excise imposed by Congress have been many, and the bases of congressional choice, either of the subject of tax or of the applicable rate, have been sometimes slight and peculiar, controversy over them on this very point of uniformity has been frequent, and all have been sustained.

3. *The classification of the statute is reasonable within the "equal protection of the laws" clause of the fourteenth amendment.*

This clause applies only to the States. However, in two cases, involving other than the taxing powers, where it was claimed that the due process clause of the fifth amendment was violated, this court, without deciding the question, said that the most which could be claimed for the due process clause is that it is equivalent to the equal protection clause of the fourteenth amendment.

In *District of Columbia* v. *Brooke,* 214 U. S. 138, Congress in the exercise of its authority over the District of Columbia provided for the abatement of nuisances by the arrest of resident property owners and the assessment of the cost of the abatement upon nonresident owners. The defendant asserted that because of this discrimination the statute was void. This court said (149, 150):

> The defendant in error asserts this discrimination and argues its consequences at some length, but does not refer to any provision of the Constitution of the United

States which prohibits Congress from enacting laws which discriminate in their operation between persons or things. If there is no express prohibition of such power, may prohibition be implied from our form of government? Upon that proposition we need not express an opinion. If prohibition exists it must rest on all the powers conferred by the Constitution. This court, however, has just held, in the case of *United States* v. *Delaware & Hudson Co.*, 213 U. S. 366, that Congress may in the exercise of the powers to regulate commerce among the States, discriminate between commodities and between carriers engaged in such commerce. And it was said that the assertion that "injustice and favoritism" might "be operated thereby," could "have no weight in passing upon the question of power."

* * *

However, the question of the power of Congress, broadly considered, to discriminate in its legislation is not necessary to decide, for whether such power is expressly or impliedly prohibited, the prohibition can not be stricter or more extensive than the fourteenth amendment is upon the States. That amendment is unqualified in its declaration that a State shall not "deny to any person within its jurisdiction the equal protection of the laws." Passing on that amendment, we have repeatedly decided—so often that a citation of the cases is unnecessary—that it does not take from the States the power of classification. And also that such classifica-

> tion need not be either logically appropriate or scientifically accurate. The problems which are met in the government of human beings are different from those involved in the examination of the objects of the physical world and assigning them to their proper associates. A wide range of discretion, therefore, is necessary in legislation to make it practical, and we have often said that the courts can not be made a refuge from ill-advised, unjust, or oppressive laws.

In the *Second Employers' Liability cases,* 223 U. S. 1, objection was made to the classification of the statute. The court said:

> But it does not follow that this classification is violative of the "due process of law" clause of the fifth amendment. Even if it be assumed that that clause is equivalent to the "equal protection of the laws" clause of the fourteenth amendment, which is the most that can be claimed for it here, it does not take from Congress the power to classify, nor does it condemn exertions of that power merely because they occasion some inequalities. On the contrary, it admits of the exercise of a wide discretion in classifying according to general, rather than minute, distinctions, and condemns what is done only when it is without any reasonable basis, and therefore is purely arbitrary (pp. 52, 53).

The scope of the equal protection of the laws clause is shown in the following cases:

Citizens' Telephone Company v. *Fuller,* 229 U. S. 322, after briefly reviewing some early cases, again

states the rule—that the legislature has the power of classification, and the right to select the differences upon which the classification shall be based, which differences need not be great or conspicuous, with the limitation that the power must not be exercised in clear and hostile discrimination between particular persons and classes.

> Thus defined and thus limited, it is a vital principle, giving to the Government freedom to meet its exigencies, not binding its action by rigid formulas but apportioning its burdens and permitting it to make those " discriminations which the best interests of society require " (p. 331).

The classification need not be logical, but may be rough and unscientific. *Mutual Loan Co.* v. *Martell,* 222 U. S. 225; *Metropolis Theater Company* v. *City of Chicago,* 228 U. S. 61, 69; *Chicago Dock and Canal Company* v. *Fraley,* Ib. 680, 686.

One assailing the classification must carry the burden of showing that it does not rest on any reasonable basis, but is essentially arbitrary. *Lindsley* v. *Natural Carbonic Gas Company,* 220 U. S. 61, 78. And before a court can interfere with the exercise of the judgment of the legislature, it must be able to say " that there is no fair reason for the law that with equal force would not require its extension to others whom it leaves untouched. *Barrett* v. *Indiana,* 229 U. S. 26, 30.

Finally, a tax law may be adopted to further a specific policy or to accomplish a certain purpose.

In *Quong Wing* v. *Kirkendall*, 223 U. S. 59, the State imposed a tax upon all persons engaged in the laundry business, other than the steam laundry business, and excepted women when so engaged when not more than two women were employed. The court said:

> A State does not deny the equal protection of the laws merely by adjusting its revenue laws and taxing system in such a way as to favor certain industries or forms of industry. Like the United States, although with more restriction and in less degree, a State may carry out a policy, even a policy with which we might disagree (p. 62). *McLean* v. *Arkansas*, 211 U. S. 539, 547; *Armour Packing Co.* v. *Lacy*, 200 U. S. 226, 235; *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S. 540, 562.
>
> * * * If the State sees fit to encourage steam laundries and discourage hand laundries that is its own affair.

Clearly the classification involved here is within the principle of the foregoing cases. The class includes all citizens who own or charter foreign-built yachts. Two reasons exist for putting them in a class apart from owners of domestic-built vessels—one a question of revenue, and the other a matter of policy.

Primarily the act is a revenue statute, and the effort was evidently made to equalize the revenue from foreign-built yachts and the return to the country from their domestic-built sisters. The home-built yacht contributes to the revenues of

the Nation in a variety of ways. If built of imported material it has paid duty directly to the United States. And if built of domestic material some part of its cost has indirectly gone into the United States Treasury for the owners or builders have paid their share of public taxes out of the profits on such domestic materials. The present statute by levying a tax upon the use of the foreign-built yacht tends to equalize the burdens upon the two classes of vessels.

Upon this ground the classification is clearly within the decision of the court in *Travellers' Ins. Co.* v. *Connecticut*, 185 U. S. 364. There a Connecticut statute imposing a greater tax upon the stock of Connecticut corporations owned by nonresidents than on that belonging to residents was sustained on the ground that it was an effort by the State to equalize the taxation on the two classes, the residents of the State being taxed also by the municipalities in which they lived.

In the second place, as a matter of policy, Congress desired to develop the ship-building industry of the United States. This would not only provide employment for citizens of the country and add to the internal wealth, but would tend to maintain shipyards and develop a body of ship builders who in time of war might materially contribute to the defense of the Nation.

It is contended that this is a tax because of origin, and that origin is not a reasonable distinction.

However, in several cases this court has sustained a classification by which the producer-seller and the purchaser-seller are distinguished. In *American Sugar Refining Co.* v. *Louisiana,* 179 U. S. 89, the planter grinding his own sugar was exempted from the license tax; and in *St. John* v. *New York,* 201 U. S. 633, the rule was applied to milk venders.

In *Adams* v. *Milwaukee,* 228 U. S. 572, this court sustained an ordinance separating milk producers into classes dependent upon whether the milk was produced within or without the city.

But in fact the principle of imposing a duty because of the foreign origin of goods is the very foundation of our tariff system. We have even carried it so far as to impose an additional duty on articles from countries paying export bounties. See section 5 of the tariff act of 1897 (30 Stat. 205). And conversely, the internal-revenue taxes are not levied upon many articles manufactured here for export. See sections 3385 and 3386, R. S.

There are clear reasons for the classification made by Congress in this statute, and it is, therefore, valid.

II. THE UNITED STATES MAY TAX THE USE OF YACHTS OWNED BY ITS CITIZENS, EVEN THOUGH SUCH CITIZENS ARE DOMICILED ABROAD AND THEIR YACHTS HAVE A FOREIGN SITUS.

1. The position of the yacht owners is rested upon the decisions of this court, among others, in *Union Transit Co.* v. *Kentucky,* 199 U. S. 194; *Ayer & Lord* v. *Kentucky,* 202 U. S. 409; and

Southern Pacific Company v. *Kentucky*, 222 U. S. 63.

In *Union Transit Company* v. *Kentucky* the State undertook to impose a tax upon railroad cars of the corporation, which had acquired a permanent situs in other States. In holding that this tax amounted to a deprivation of property without due process of law, the court remarked:

> The power of taxation * * * is exercised upon the assumption of an equivalent rendered to the taxpayer in the protection of his person and property. * * * If the taxing power be in no position to render these services or otherwise to benefit the person or property taxed * * * the taxation of such property within the domicile of the owner partakes rather of the nature of an extortion than a tax. * * *
>
> It is often said protection and payment of taxes are correlative obligations (pp. 202, 204).

And it is added that property which is wholly and exclusively within the jurisdiction of another State receives none of the protection for which the tax is supposed to be the compensation.

In *Ayer & Lord* v. *Kentucky* it was attempted to tax in Kentucky vessels belonging to an Illinois corporation enrolled in a Kentucky port, but having no situs in that State. The court said:

> The general rule has long been settled as to vessels plying between the ports of different States, engaged in the coastwise trade,

> that the domicile of the owner is the situs of a vessel for the purpose of taxation, wholly irrespective of the place of enrollment, subject, however, to the exception that where a vessel engaged in interstate commerce has acquired an actual situs in a State other than the place of the domicile of the owner, it may there be taxed because within the jurisdiction of the taxing authority (p. 421).

In *Southern Pacific Company* v. *Kentucky*, the company was a Kentucky corporation, and the vessels taxed plied between New York, Galveston, and New Orleans, but had not acquired a situs at any of these places. Held that the property was taxable at the domicile of the owner.

> To lay down a principle that vessel property has no situs for purposes of taxation other than that of actual permanent location, would introduce elements of uncertainty concerning the situs of such property not presented by other kinds of movable property. * * *
>
> A ship is not intended to stay in port, but to navigate the seas. Its stay in port is a mere incident of its voyage, and to determine that it has acquired an actual situs in one port rather than another would involve such grave uncertainty as to result often in an entire escape from taxation * * *.
>
> The legality of a tax is not to be measured by the benefit received by the taxpayer, although equality of burdens be the general standard sought to be attained. Protection

and taxation are not necessarily correlative obligations * * *.

The Southern Pacific Company is a corporation having much extraordinary power. It only exists and exercises this power by virtue of the law of Kentucky. By the law of its being it resides in Kentucky and there maintains its general office and there holds its corporate meetings. To say that the protection which the corporation receives from the State of its origin and domicile affords no basis for imposing taxes upon tangibles which have not acquired an actual situs under some other jurisdiction is not supportable upon grounds of either abstract justice or concrete law (pp. 74, 75, 76).

2. All the decisions on this subject have arisen from attempts by a State to tax absent property. In no case has it been held that the United States, as a Nation, is bound by the same rule. The reason of the rule requires a contrary holding. The United States, unlike the States, is not confined by its territorial limitations in the protection of its citizens and their property. Its protection extends throughout the world. If the only condition of taxation is protection, it necessarily follows that the United States may tax its citizens residing abroad.

Reason will extend the power to tax personal and real property situated in foreign countries if owned or used by our citizens.

Indeed, the United States has on several occasions exerted this power. The income-tax law of

June 30, 1864, section 116 (13 Stat. 281), imposed a tax on the income—

> of every person residing in the United States or of any citizen of the United States residing abroad, whether derived from any kind of property * * * or from any profession * * * carried on in the United States or elsewhere, or from any other source whatever.

Substantially the same provision was contained in the acts of March 2, 1867 (14 Stat. 477), and of August 27, 1894 (28 Stat. 553). In the act of July 14, 1870 (16 Stat. 257), the tax was upon the income—

> of every person residing in the United States or of any citizen of the United States residing abroad, derived from any source whatever, whether within or without the United States.

In the case of *United States* v. *Erie Railway Co.*, 106 U. S. 330, the dissenting opinion in which is cited on the other side, the majority of the court sustained a tax which Mr. Justice Field in his dissent described as a tax upon the income of nonresident *aliens*. The right to tax nonresident citizens was not involved.

3. But it is unnecessary to press the argument to this extent. Ships are in a class by themselves. A yacht belonging to a citizen of the United States, even though not a vessel of the United States in the sense that it is entitled to registry or enrollment,

yet flies the American flag, and is the object of peculiar protection by the United States.

(*a*) These yachts fly the American flag. This court said in *The Conqueror* (166 U. S. 119):

> The privilege, then, of owning foreign-built vessels and of navigating them under the protection of the American flag is practically confined to vessels used for purposes of pleasure.

(*b*) They are territory of the United States to which our laws extend. Clark & Marshall on Crimes, 2d ed., p. 737; 2 Moore International Law, pp. 255, 256.

Recognizing its obligations in this connection, Congress has provided for the punishment of offenses committed on such vessels. Section 272 of the Penal Code of March 4, 1909 (35 Stat. 1142), punishes certain crimes and offenses when committed on board any vessel belonging in whole or in part to the United States, "*or any citizen thereof.*"

Treaties have been made with foreign nations permitting the punishment by this country of certain offenses committed on such vessels in foreign ports. *Wildenhus's case,* 120 U. S. 1, 12.

The protection thus given by the United States to these yachts is as great as if they were entitled to registry or enrollment; and it is conceivable that such a case may arise with respect to one of them as to involve the United States in war with a foreign country.

(*c*) Additional privileges within the waters of the United States are extended to these yachts.

The chief of such privileges is the exemption from the payment of "light money." Light money is a duty of 50 cents per ton levied by section 4225 on all vessels "not of the United States," which may enter our ports. Section 4226 directs that the preceding section shall not operate on unregistered vessels owned by citizens of the United States carrying a sea letter or document issued from a customhouse proving the vessel to be American property.

Section 4190, R. S., authorizes the issue of such documents to vessels owned wholly by citizens of the United States. Under this section, article 62 of the Customs Regulations was promulgated by the Secretary of the Treasury, providing for the issue of a certificate to citizens owning foreign-built yachts. Such certificates, as before stated, have been issued to all the yacht owners in these cases. And by virtue of this certificate the owner of the yacht is exempt from the payment of the light money. *The Miranda,* 47 Fed. 815; affirmed Circuit Court of Appeals, 2d Cir., 51 Fed. 523; cited approvingly in *The Conqueror,* 166 U. S., at 119. *The Alta,* 136 Fed. 513, C. C. A., 9th Cir.

4. The right to tax may be supported by analogy to the right of a nation to punish its citizens for crimes committed abroad.

This right of the sovereign is clearly settled. Clark & Marshall, Crimes, p. 743; Beale Criminal

Pleading and Practice, p. 2; 2 Moore International Law, 255, et seq.

The following list of statutes adopted by Congress in pursuance of this general power is taken from Clark and Marshall (p. 744):

> The power to punish acts committed in foreign countries has been recognized by Congress. Statutes have been enacted giving ministers and consuls of the United States, in pursuance of treaties with China, Japan, and certain other countries, jurisdiction to arraign and try, in the manner therein provided, all citizens of the United States charged with offenses against law, committed in such countries (Rev. St. sec. 4084. See *In re Stupp*, 11 Blatchf. 124 Fed. Cas. No. 13562), and giving like jurisdiction to consuls and commercial agents of the United States at islands or in countries not inhabited by any civilized people, or recognized by any treaty with the United States. Rev. St. sec. 4088. Another act punishes any citizen of the United States, though residing or abiding in a foreign country, who shall, without the permission or authority of the United States, "directly or indirectly commence or carry on any verbal or written correspondence or intercourse with any foreign Government, or any officer or agent thereof, with an intent to influence the measures or conduct of any foreign Government, or any officer or agent thereof, in relation to any disputes or controversies with the United States. Id. sec. 5335. Another statute punishes correspondence with rebels,

though the offense may be committed in a foreign country. Act Cong. Feb. 26, 1863. Another statute punishes perjury or subornation of perjury abroad before secretaries of legation and consular officers, and forgery of consular papers. Rev. St. sec. 4083 et seq.

If these yachts are territory of the United States within the criminal laws, certainly they are within the United States for purposes of taxation.

III. THE 35 PER CENT DUTY.

Counsel for Mr. Rainey attacks as unconstitutional the paragraph of section 37, permitting the owner of any yacht to pay a duty of 35 per cent ad valorem in lieu of the annual tax.

This point may be disposed of in the language of Judge Noyes, as follows:

> This contention is at least doubtful. The owner is not required to pay this duty. He is merely given the option of paying it. In its nature it would seem to be a duty on imports and such duties are not held to be direct taxes requiring apportionment. But it is unnecessary to pass upon this question. These actions are for the recovery of the annual tonnage tax and the validity of the ad-valorem tax is not involved. The provisions concerning that tax are separable from those concerning the annual tax. The one is not dependent upon the other and there is no indication that Congress would not have adopted the one without the other. Under such conditions it is well settled that un-

constitutional provisions may be separated from legal provisions and effect be given to the latter. (Rec. 74, p. 12.)

IV. SECTION 37 IS NOT UNCONSTITUTIONAL BECAUSE IT ORIGINATED IN AN AMENDMENT FIRST PROPOSED IN THE SENATE.

The history of this section, as given in the brief for Mr. Rainey (pp. 18 and 19) may be taken to be correct. The section was proposed in the Senate as an amendment to the tariff bill. The section was amended in the House, and as thus amended was adopted.

The same objection to the validity of section 38 was thus disposed of by this court in *Flint* v. *Stone Tracy Co.*, 2220 U. S., at p. 143:

> The amendment was germane to the subject matter of the bill and not beyond the power of the Senate to propose. In thus deciding we do not wish to be regarded as holding that the journals of the House and Senate may be examined to invalidate an act which has been passed and signed by the presiding officers of the House and Senate and approved by the President and duly deposited with the State Department.

THIRD—MISCELLANEOUS QUESTIONS.

I. THE YACHT OF MR. RAINEY IS LIABLE TO THE TAX, NOTWITHSTANDING THE TREATY OF JULY 3, 1815, WITH GREAT BRITAIN.

This treaty provides that no higher duties or charges shall be imposed in any of the ports of the United States on British vessels than those payable

in the same ports by vessels of the United States. It is argued for Mr. Rainey that this treaty is violated by the yacht tax.

We are content to submit this question upon the decision of Judge Noyes (Rec. No. 74, p. 21), and the findings of fact and of law by Judge Hough (Rec. 73, pp. 21, 22).

Judge Hough finds as a fact that under the law of Great Britain a ship is not a British vessel unless owned by a subject or corporation of that country; that on June 25, 1908, the yacht *Cassandra* was purchased by Mr. Rainey in Scotland, and a few days thereafter the bill of sale was recorded with the collector of customs of New York (Rec. 73, p. 20). The court concludes as a matter of law that by this sale the yacht lost her character as a British vessel and is not within the treaty (Ib. 23).

Judge Noyes also calls attention to the decisions of this court that a treaty is repealed by an inconsistent subsequent act of Congress. (Rec. 74, p. 21.)

II. SUIT IN PERSONAM LIES TO RECOVER THE DUTY.

> If the statute creates an obligation to pay the tax, and does not provide an exclusive remedy, the action must be regarded as well brought. *United States* v. *Chamberlin*, 219 U. S. 250, 258.

III. THE UNITED STATES IS ENTITLED TO INTEREST ON THE SEVERAL TAXES FROM THE TIME THEY BECAME DUE.

Counsel for the yacht owners cite a large number of State cases in support of their contention

that a tax does not bear interest unless the statute expressly so provides.

In many of these cases the point was not involved, but the statement was made by way of argument in support of the proposition that debt would not lie to recover a tax where another remedy was provided. In these cases another remedy was provided—the imposition of a penalty far more severe than the usual allowance of interest.

Still it is true that the great majority of the State cases take this view. Mr. Guthrie's brief seems to contain a complete collection, but any he has missed will probably be found in the note to *Rochester* v. *Bloss*, 185 New York 42, as reported in 6 L. R. A. N. S. 694.

The only reason given by the State courts is that a tax is a burden, imposed upon the citizen without his consent, and that such burden will not be increased by the courts.

It seems to us that this reasoning is clearly wrong. It puts a premium on delay by the property owner, and establishes gross inequality between the citizen who pays and the one who dodges his tax. Besides, the tax is a self-imposed burden and is the citizen's contribution of his share of the expenses of the Government. The nonpayment of a tax at the time it is due may seriously embarrass the Government, and operate disastrously upon the citizen himself.

When a tax becomes payable it represents a liquidated sum of money due from the property owner

to the State. If he fails to pay, but wrongfully withholds the money due, he should pay in addition the usual interest on the money to compensate the State for the lack of its use. True, this may be far less than the actual injury to the State, and hence heavy penalties and summary methods of collection are usually prescribed. But where the State does not see fit to exert its extraordinary power of imposing heavy penalties, it is none the less entitled to the ordinary interest upon the tax from the time it falls due until it is paid.

This principle has been applied by this court both in suits to recover customs duties, and in suits by Federal and State authorities to recover other taxes.

In *Young* v. *Godbe,* 15 Wall. 562, 565, this court said:

> If a debt ought to be paid at a particular time, and is not, owing to the default of the debtor, the creditor is entitled to interest from that time by way of compensation for the delay in payment * * *. If there is no statute on the subject, interest will be allowed by way of damages for unreasonably withholding payment of an overdue account. The rate must be reasonable and conform to the custom which obtains in the community in dealings of this character.

In *People* v. *County of New York,* 5 Cowen 334, Savage, Ch. J., said:

> It is certainly reasonable that when money is due and withheld against the consent of

the creditor, the debtor should pay interest as a compensation to the creditor, who has lost the use of his money.

This principle has been applied from the very beginning of our Government in actions to recover duties on imported merchandise. The cases of *U. S.* v. *Lyman*, 1 Mason 482, and *Meredith* v. *U. S.*, 13 Peters 486, settled the law that duties on imported merchandise constitute personal debts to the United States from the importers and that an action of debt will lie to collect them. In the following cases recovery of duties together with interest thereon was permitted:

Cheang-Kee v. *U. S.*, 3 Wall. 320.
U. S. v. *Dodge*, 1 Deady 124.
U. S. v. *Cobb*, 11 Fed. 76.
U. S. v. *Mexican International Railway Co.*, 154 Fed. 519.

In the last case the point was squarely presented and is fully discussed.

It seems immaterial whether the tax is technically a debt. The amount is definite, and time of payment fixed and certain. This principle has been applied by this court in numerous cases.

Railroad Company v. *United States*, 101 U. S. 550, was a suit by the United States to recover an internal revenue tax under section 15 of the act of July 14, 1870, 16 Stat. 260, which provided " that there shall be levied and collected for and during the year 1871 a tax of two and one-half per centum on the amount of all interest or coupons paid on

bonds." The cause was remanded with instructions to enter judgment for the sum of the tax "and interest thereon at six per cent from March 1, 1872."

In *Litchfield* v. *County of Webster,* 101 U. S. 773, Litchfield sued to enjoin the county treasurer from collecting taxes for several years on certain lands. Both the State and the United States disputed his title to the lands. When the question of title was adjusted, Litchfield offered to pay the tax with interest at the ordinary rate, but the treasurer demanded the statutory penalty. This court held that he was chargeable only with the legal rate of interest on the taxes, saying:

> He, therefore, actually owes the money called for by the taxes, and may properly be charged with such interest after the taxes became due as is by law payable on other money obligations.

In *United States* v. *Erie Railway Company,* 106 U. S. 327, the Government sued to recover taxes due on certain interest coupons paid by the defendant in the years 1866–1869 on bonds previously issued by it, the action being founded on section 122 of the internal revenue act of June 30, 1864, ch. 173 (13 Stat. L. 284), as amended by the act of July 13, 1866, ch. 184 (14 Stat. L. 138). Both the lower courts held that the Government was entitled to only a portion of the tax sued for, but this court held that it was entitled to the full amount claimed and remanded the cause "with instructions to enter a judgment in favor of the United States, for the

equivalent in lawful money of the United States of the tax of nine thousand three hundred pounds sterling, *with interest at the rate of six per cent per annum from the several times when the same became due and payable* according to the agreed statement of facts on which the submission was made below."

Notwithstanding the State cases, therefore, it is established by the decisions of this court and of the lower Federal tribunals, that in suits to recover overdue taxes the Government is entitled to ordinary interest. The principle is just and equitable; a definite sum is due at a certain time, and the Government should be compensated for the loss of its use.

CONCLUSION.

It is submitted that the judgments in cases 64 to 67 and 73 and 74, brought directly from the Circuit Court, should be affirmed; that the question relating to interest certified in cases 623 to 628 should be answered in the affirmative; that in case 629 question VI should be answered in the negative, the first clauses of questions II and III in the affirmative and the second clause in the negative, and that the remaining questions should be answered in the affirmative; in case 630 that question VII should be answered in the negative and questions I to VI and VIII in the affirmative; in case 631 that question IX should be answered no, the first clause in questions IV and V yes, and the

second clause no, and that the remaining questions should be answered yes; and that in case 632 question VII should be answered no, and the remaining questions yes.

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Assistant Attorney General.
KARL W. KIRCHWEY,
Attorney.

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CLERK

Supreme Court of the United States.

ROY A. RAINEY,
Plaintiff-in-Error.

against

UNITED STATES OF AMERICA,
Defendant-in-Error.

[redacted]

YACHT TAX CASES.

No. 747 (Action No. 1.) Tax of 1909.
No. 748 (Action No. 2.) Tax of 1910.

Brief on Behalf of Plaintiff-in-Error.

C. ANDRADE, JR.,
Of Counsel for Plaintiff-in-Error.

APPEAL PRINTING COMPANY, NEW YORK.

INDEX.

PAGE

I. Statement of the Case..... 1

II. A Specification of the Errors Relied on... 3

III. Argument 9

1. The act on its face shows that it was intended to operate prospectively; and therefore the tax is not payable until September 1, 1910..... 9

2. The act does not levy a tax, but deprives defendant of his property without due process of law..... 20

3. The thirty-five per cent. duty is a direct tax, and void because not apportioned.... 21

4. The seven dollar per ton annual tax on the use of the yacht is an excise or indirect tax, and void for want of uniformity..... 23

5. Defendant's use of the yacht prior to August 5, 1909, tax free, was property. In order to make the tax fall due September 1, 1909, it is necessary to destroy such tax-free use of the yacht prior to August 5, 1909, which is a deprivation of property without due process of law..... 24

6. A recovery in this action would destroy rights vested in the defendant under the British treaty of 1815, and would deprive defendant of his property without due process of law; and further congress did not intend to annul the treaty of 1815..... 27

PAGE

7. The act does not authorize any action *in personam* against the owner or managing owner..... 37

8. The Yacht Tax, Section 37, of the Act of August 5, 1909, is void, as it is a bill for raising revenue, and it originated in the Senate and not in the House of Representatives..... 38

9. The judgment in action No. 1 should be reversed..... 41

10. The judgment in action No. 2 should be reversed..... 41

Authorities Cited.

Act of Congress, June 5, 1794, Sec. 3..... 38
Act of Congress, August 5, 1909;
Sec. 37, Par. 1..... 1, 30, 31
" 37 " 2..... 2, 31
" 38 " 3..... 17
American v Worthington..... 13
Benziger v U. S..... 13
British Treaty of July 3, 1815..... 27
" " October 20, 1818..... 28
" " August 6, 1827..... 28
Chew Heong v. U. S..... 34
Congressional Record..... 18, 36
Constitution of U. S., Art. 1, Sec. 2, Cl. 3.... 22
" " " " 1, " 7,..... 38
" " " " 9, Cl. 3,..... 26
" " " " 1, " 9, Cl. 4.... 22
" " " " 1, " 10, " 3.... 32
" " " " 6,..... 28
" " " 5th Amendment..... 26
Cooley's Constitutional Limitations..... 27

PAGE

Fed. Statutes Annotated..... 28

Harvey v. Tyler..... 15
Hylton v. U. S..... 32

Jay in the Federalist..... 35

Knowlton v. Moore..... 23

Lewis v. Pa. R. R. Co..... 27

McEwen v. Den..... 15
Murray v. Gibson..... 14

Pollock v. Farmer's Loan & Trust Co..... 21, 24

Re Pennsylvania Telephone Co..... 39
Revised Statutes of the U. S., Sec. 4131..... 29
" " " " " 4132..... 29

Sohn v. Waterson..... 15
State v. Smith..... 40
Story on the Constitution..... 40

The Miranda..... 30
Thomas v. U. S..... 32
Twenty Per Cent Cases..... 16

U. S. v. Heath..... 13
" v. Hylton..... 23
" v. Reese..... 33
" v. Wigglesworth..... 13

Warren v. Crosby..... 39

Supreme Court of the United States.

ROY A. RAINEY,
Plaintiff-in-Error,

against

THE UNITED STATES OF AMERICA,
Defendant-in-Error.

October Term 1911.
Nos. 747 and 748.

No. 747. (Action No. 1.) Tax of 1909.
No. 748. (Action No. 2.) Tax of 1910.

BRIEF ON BEHALF OF PLAINTIFF-IN-ERROR.

I.

Statement of the Case.

The steam yacht Cassandra was built in Great Britain and purchased by the plaintiff-in-error prior to August 5, 1909.

On August 5, 1909, the Congress of the United States passed an act entitled "An act to provide Revenue, equalize duties and encourage the industries of the United States, and for other purposes," containing the following provisions:

> "Sec. 37. There shall be levied and collected annually on the first day of September by the collector of customs of the district nearest the residence of the managing owner,

upon the use of every foreign-built yacht, pleasure boat or vessel, not used or intended to be used for trade, now or hereafter owned or chartered for more than six months by any citizen or citizens of the United States, a sum equivalent to a tonnage tax of seven dollars per gross ton.

"In lieu of the annual tax above prescribed the owner of any foreign-built yacht, pleasure boat or vessel above described may pay a duty of thirty-five per centum ad valorem thereon, and such yacht, pleasure boat or vessel shall thereupon be entitled to all the privileges and shall be subject to all the requirements prescribed by sections 4214, 4215, 4217 and 4218 of the Revised Statutes and Acts amendatory thereto in the same maner as if said yacht had been built in the United States and shall be subject to tonnage duty and light money only in the same manner as if said yacht had been built in the United States.

"So much of section 5 of chapter 212 of the Laws of 1908, approved May 28th, 1908, as relates to yachts built outside the United States and owned by citizens of the United States is hereby repealed.

"This section shall not apply to a foreign built vessel admitted to American registry."

The collector of customs of the port of New York, on September 1, 1909, declared the tax to be then due and payable by the plaintiff-in-error.

The plaintiff-in-error refused to pay the tax, alleging various objections which will be fully discussed in the argument.

Thereupon, to wit, December 16, 1909, the United States began action No. 1 in the United States Circuit Court for the Southern District of New York against the plaintiff-in-error *in personam* for the collection of the tax.

The plaintiff-in-error filed an answer in the Court below setting up rights under certain treaties and constitutional provisions.

The defendant-in-error demurred to the answer, and the Court below sustained the demurrer. The plaintiff-in-error thereupon sued out the present writ of error in action No. 1.

In September, 1910, the Collector of Customs of the port of New York, declared the tax to be then due and payable for that year by the plaintiff-in-error. The plaintiff-in-error again refused payment, setting up a number of the same objections which he had urged in 1909.

Action No. 2 was then begun, and the defendant answered. This action was brought to trial before the Court without a jury and the Trial Court overruled the motion of the plaintiff-in-error to dismiss the complaint and filed a decision in favor of the defendant-in-error. The plaintiff-in-error duly excepted, and comes here on a writ of error to review the judgment.

All of the defenses raised in action No. 2 are urged in action No. 1, and both cases are therefore included in this brief.

II.

A specification of the errors relied upon.

Action No. 1.

I.

That the court erred in not holding that section 37 of the act of the Congress of the United States entitled "An Act to provide Revenue, Equalize Duties and encourage the industries of the United States, and for other purposes" passed August 5, 1909, on its face shows that it was intended to operate prospectively, and that therefore said tax is not payable until September 1910.

II.

That the court erred in not holding that section 37 of the act of the Congress of the United States entitled "An Act to provide Revenue, Equalize Duties and encourage the industries of the United States, and for other purposes" passed August 5, 1909, does not levy a tax, but deprives defendant of his property without due process of law, in contravention of the Fifth Amendment to the Constitution of the United States.

III.

That the court erred in not holding that section 37 of the act of the Congress of the United States entitled "An Act to provide Revenue, Equalize Duties and encourage the industries of the United States, and for other purposes" passed August 5, 1909, in so far as it lays a duty of 35 per cent. ad valorem is a direct tax, and void because not apportioned, in contravention of Article 1 Section 2 and Article 1 Section 9, of the Constitution of the United States.

IV.

That the court erred in not holding that section 37 of the act of the Congress of the United States entitled "An Act to provide Revenue, Equalize Duties and encourage the industries of the United States, and for other purposes" passed August 5, 1909, in so far as it lays an annual tax of seven dollars per gross ton, being an excise tax is void for want of uniformity, in contravention of Article 1, Section 8 of the Constitution of the United States.

V.

That the court erred in not holding that the defendant's use of the yacht prior to August 5, 1909, tax-free, was property, and that the collection of the tax in this case would be a deprivation of such property without due process of law, in contravention of the Fifth Amendment to the Constitution of the United States.

VI.

That the court erred in not holding that a recovery in this action would destroy rights vested in the defendant under the British Treaty of July 3, 1815, and would deprive the defendant of his property without due process of law.

VII

That the court erred in not holding that section 37 of the act of the Congress of the United States entitled "An Act to provide Revenue, Equalize Duties and encourage the industries of the United States, and for other purposes" passed August 5, 1909, does not authorize any action *in personam* against any owner or managing owner.

VIII.

That the court erred in not holding that section 37 of the act of the Congress of the United States entitled "An Act to provide Revenue, Equalize Duties and encourage the industries of the United States, and for other purposes" passed August 5, 1909, is void as being a bill for raising revenue and that it originated in the Senate and not in the House of Representatives, in contravention of Article 1, Section 7 of the Constitution of the United States.

IX.

That the court erred in holding that the six months limitation in section 37 of the act of the Congress of the United States entitled "An Act to provide Revenue, Equalize Duties and encourage the industries of the United States, and for other purposes" passed August 5, 1909, applied only to a charter, and did not apply to an ownership of a foreign-built yacht.

X.

That the court erred in sustaining the demurrer to the answer to the amended complaint.

XI.

That the court erred in entering judgment in favor of the plaintiff and against the defendant in the sum of $8,651.17.

Action No. 2.

1.

The court erred in denying the defendant's motion to dismiss the complaint made at the close of the plaintiff's case as follows:

> "Mr. Andrade: If the Court please, we move to dismiss on the plaintiff's evidence, on the following grounds:
>
> 1. That the complaint fails to set forth facts sufficient to constitute a cause of action.
>
> 2. That the plaintiff has failed to prove facts sufficient to constitute a cause of action.
>
> 3. That Section 37 of the Act of Congress, approved August 5, 1909, under which this

action is brought, does not levy a tax, but deprives the defendant of his property without due process of law, in contravention of the fifth amendment to the Constitution of the United States.

4. That the 35 per cent. duty contemplated by Section 37 of said act, is a direct tax and void, because not apportioned in contravention of Article 1 of Section 2, and Article 1 of Section 9 of the Constitution of the United States.

5. That the $7 per ton tax contemplated by Section 37 of said act is an excise or indirect tax, and void, for want of uniformity, in contravention of Article 1 of Section 8 of the Constitution of the United States.

6. That Section 37 of the said act does not authorize any action *in personam*, against the owner or managing owner of any yacht.

7. That Section 37 of the said act, is void, as it is a bill for raising revenue, and it originated in the Senate and not in the House of Representatives, in contravention of Article 1, Section 7 of the Constitution of the United States.

The Court: Those several motions are denied, and it will be taken under advisement.

Mr. Andrade: We pray an exception to the ruling of the Court."

2.

The court erred in denying the defendant's motion to dismiss the complaint made at the close of all the evidence as follows:

"Mr. Andrade: If the court please, the defendant rests and the defendant renews the motion now made on all the evidence, to dismiss the complaint on the several grounds already recited.

The Court: That motion I will take under advisement.

Exception by defendant."

3.

The court erred in finding its first conclusion of law, as follows:

"1. Section 37 of the Tariff Act of August 5th, 1909, is valid and not in conflict with the Constitution of the United States, or any portion thereof, and the tax imposed thereby is not unreasonably arbitrary or discriminatory. It is not a direct tax but an excise and is geographically uniform. It does not deprive the defendant of his property without due process of law."

4.

The court erred in finding its fourth conclusion of law, as follows:

"4. The said tax of $8589 was duly and lawfully levied under the said Act by the Collector of Customs of the Port of New York on the 1st day of September, 1910, against the defendant on the use of the said yacht."

5.

The court erred in finding its fifth conclusion of law, as follows:

"5. The said yacht, after her purchase by the defendant on the said 25th day of June, 1908, lost her character as a British vessel, and she is not now and, since the 25th day of June, 1908, has not been a British vessel within the meaning of the Treaty with Great Britain of July 3d, 1815, as extended by the Treaties of October 20th, 1818 and August 6th, 1827, nor has the defendant, as her owner, acquired

under the said Treaty, or under Article 6, Clause 2, of the Constitution of the United States, or any other Article or Clause thereof, any right, title, privilege or immunity to be exempted or have his said yacht exempted from the operation of said Section 37 of the Tariff Act of August 5th, 1909."

6.

The court erred in finding its sixth conclusion of law, as follows:

"6. The plaintiff is entitled to judgment against the defendant for the sum of $8589, with its costs and disbursements, but without interest, and I direct judgment accordingly."

7.

The court erred in entering judgment in favor of the plaintiff and against the defendant in the sum of $8612.97.

III.

Argument.

(Numbers in brackets refer to pages of the printed record.)

I.

(First assignment of error, Action No. 1.)

The act on its face shows that it was intended to operate prospectively, and therefore the tax was not payable until September, 1910.

A. THE TAX LAW WAS PASSED AUGUST 5, 1909, "APPROVED, SIGNED 5 MINUTES AFTER 5 O'CLOCK P. M., AUGUST 5, 1909."

B. THE TAX IS PAYABLE "ON THE FIRST DAY OF SEPTEMBER" WITHOUT MENTIONING THE YEAR.

(SEC. 37, PARAGRAPH 1.)

C. THE TAX IS AN ANNUAL TAX.

Sec. 37, Paragraph 1:

"There shall be levied and collected *annually*."

Sec. 37, Paragraph 2:

"In lieu of the *annual* tax above prescribed," &c.

Now, as the tax is an annual tax, and as it was approved August 5, 1909, it is clear that the period of one year contemplated by the term "annual" should begin to run on August 5, 1909. To make the year begin to run prior to August 5, 1909, would be to place a retroactive interpretation on the act; and, as will be shown in Paragraph G, *infra*, an act will not be construed retroactively, if any other construction is possible.

As the year, then, begins to run August 5, 1909, it will not be complete until August 5, 1910, and the first September 1 after that date is September 1, 1910.

It is therefore clear that Congress did not intend to make this tax payable until September 1, 1910.

D. THE TAX IS ON A SIX MONTH'S OWNERSHIP OR CHARTER.

The tax is laid on the use of foreign built yachts

"now or hereafter owned or chartered *for more than six months*" (Sec. 37, Par. 1.)

It is entirely obvious from this language that it

is a condition precedent to the very existence of the tax that there must have been ownership or use by an American citizen for a period of six months.

If an American citizen should own or charter a foreign-built yacht for a period of five months and fifteen days, and should then sell or surrender the yacht to a foreign owner, it is entirely patent that no tax whatever would be payable on account of that yacht by anyone.

It is therefore equally patent that at the expiration of one or two months, or even at the expiration of five months and fifteen days from the beginning of an ownership or charter by an American citizen, no tax could lawfully be levied on such yacht, and still less could such a tax be payable by such a yacht; *non constat*, but immediately after such levy or payment, and before the end of the six months, the American owner or charterer might sell or surrender to a foreign owner, in which event the supposed levy or collection of the tax would prove to be clearly illegal and contrary to the express words of the act.

It is therefore clear that no levy or collection of the tax can take place, nor is the tax in any event due, until after the yacht has been owned or chartered by an American citizen for a period of six months.

As already shown in Paragraph C *supra*, the initial date on which the period begins to run must be August 5, 1909. To place that initial date prior to August 5, 1909, involves a retroactive operation and interpretation for the act.

With August 5, 1909, as the initial date, the statutory six months' period expires February 5, 1910; and not before February 5, 1910, can any tax be levied or payable under the act.

It follows necessarily from this that a levy of

the tax on September 1, 1909, was premature, and that the tax was not payable on that date, hence action No. 1 must fall.

E. THE SIX MONTHS PERIOD APPLIES AS WELL TO OWNERSHIP AS TO CHARTER (NINTH ASSIGNMENT OF ERROR IN ACTION NO. 1).

In order to avoid the foregoing argument as to the retroactive nature of the tax levied September 1, 1909, the counsel for defendant in error argued below that the words of the act, "owned or chartered more than six months" meant "owned for any period of time, no matter how short, or chartered for more than six months," and that therefore even one day's ownership of a yacht after August 5, 1909 and before September 1, 1909, was a sufficient ownership at once to avoid the objection of retroactiveness, and to make lawful a levy on September 1, 1909; and the lower court so held.

We submit with much deference that the lower court erred in so holding.

The annual tax is a tax on *use*. And so far as use is concerned, a charterer has just as much beneficial enjoyment of a yacht as an owner. Therefore in the nature of the tax there is no reason for applying the six months limitation to a charter and not to an ownership.

In addition to that, it should be remembered that a taxing statute should be strictly construed against the government; and if the language used is ambiguous, the doubt should be settled in favor of the taxpayer. Here, as mere matter of grammatical construction, the words "for more than six months" are every whit as applicable to the word "owned" as to the word "chartered"; to hold otherwise is to construe the language strongly against

the taxpayer and in favor of the government, which is the exact opposite of what should be done.

U. S. *v.* Wigglesworth, 2 Story, 369 (U. S. C. C. D., Mass., 1842).

Statutes levying taxes or duties on subjects or citizens are to be construed most strongly against the Government.

Ac. American Net & Twine Co. *v.* Worthington, 141 U. S., 468 (1891).

Benziger *v.* U. S., 192 U. S., 38 (1904).

F. THE ACT CONTAINS THE WORD "HEREAFTER" WHICH IS A WORD PROSPECTIVE IN ITS IMPORT AND NOT RETROACTIVE.

The use of the word "hereafter" strengthens and fortifies a prospective interpretation for the act, and in like manner weakens and negatives any retrospective interpretation.

G. AN ACT OF CONGRESS WILL ALWAYS BE CONSTRUED PROSPECTIVELY IF POSSIBLE, AND NOT RETROACTIVELY.

This doctrine is one of the cardinal principles of statutory construction.

U. S. *v.* Heath, 3 Cranch., 399 (1806).

An old act of Congress provided that collectors of revenue should have as fees 3 per cent. on all moneys received from duties on imported goods.

A new act in effect June 30, 1800, reduced this fee to 2½ per cent.

A collector took bonds for payment of duties on goods *imported prior to June 30*, 1800.

The importers *paid* the bond *after June 30,* 1800.

The question was whether the collector was entitled to 3 per cent. under the old law, or 2½ per cent. under the new law.

Held: That he was entitled to 3 per cent. under the old law.

The Supreme Court said, per CUSHING, J.:

"The general and true intent of the latter law was to make a new allowance in lieu of the former only on duties arising on goods imported after the last law came into operation, and not to have a retrospective effect, to divest vested rights of the collector; it being unreasonable, in my opinion, to give the law a construction, which would have such a retroactive effect."

Murray *v.* Gibson, 15 How., 421 (U. S. Sup. Ct., 1853).

A statute of Mississippi, passed in 1846, declared that no record of any judgment recovered in a foreign court against a citizen of that state shall be received as evidence after the expiration of three years from the time of the rendition of such judgment.

Held: That the statute had no application to judgments rendered before its passage. Hence, where it was pleaded as a defence in a suit brought upon a judgment recovered in Louisiana, in 1844, the plea was bad, and a demurrer to it sustained.

We would earnestly commend the Murray case to the attention of the Court as being a controlling authority in the case at bar.

The whole crux and stress of the Murray case bore on the question of whether or not the period of three years mentioned in the act, then before the Court, started to run at the date of the pass-

age of the act, or at some period prior to the passage of the act, and the Court held clearly that the period began to run at the date of the passage of the act.

How can the case at bar be distinguished from the Murray case? The whole crux here is whether the six months' period of ownership or charter is to run from the passage of the act on August 5, 1909, or from some date prior thereto.

This Court said in the Murray case that the initial date for the period is the date of passage of the act; and it would therefore seem that this Court, on that authority, should so hold in the case at bar.

McEwen *v.* Den, 24 How., 242 (U. S. Sup. Ct., 1860).

The Court, at page 244: "It is of the very essence of a new law that it shall apply to future cases, and such must be its construction, unless the contrary clearly appears."

Harvey *v.* Tyler, 2 Wall., 328 (U. S. Sup. Ct., 1864).

The Court, at page 347: "It is a rule of construction, that all statutes are to be considered prospective, unless the language is express to the contrary, or there is a necessary implication to that effect."

Sohn *v.* Waterson, 17 Wall., 596 (U. S. Sup. Ct., 1873).

A right of action accrued in 1854.

A statute of limitations passed in 1859 barred all actions of that kind not "commenced within two years next after the cause or right of such action shall have accrued."

Held: That suit might be brought any time within 2 years after the date of the *statute*, and that the statute did not summarily cut off existing rights.

The Court, at page 599:

"But if an action accrued more than the limited time before the statute was passed, a literal interpretation of the statute would have the effect of absolutely barring such action at once. It will be presumed that such was not the intent of the legislature. Such an intent would be unconstitutional."

So in the case at bar, the six months' period must begin to run on August 5, 1909, the date when the act went into effect.

Twenty per cent. cases, 20 Wall., 179 (U. S. Sup. Ct., 1873).

The Court, at page 187:

"Courts of Justice agree that no statute, however positive in its terms, is to be construed as designed to interfere with existing contracts, rights of action, or with vested rights, unless the intention that it shall so operate is expressly declared or is to be necessarily implied, and pursuant to that rule courts will apply new statutes only to future cases, unless there is something in the nature of the case or in the language of the new provision, which shows that they were intended to have a retroactive operation. *Even though the words of a statute are broad enough in their literal extent to comprehend existing cases, they must yet be construed as applicable only to cases that may hereafter arise, unless the language employed expresses a contrary intention in unequivocal terms.*"

H. SECTION 38, PARAGRAPH THIRD OF THE ACT, LEVYING A TAX ON CORPORATIONS, STATES CATEGORICALLY THAT THE TAX THEREBY CREATED SHALL BE COMPUTED "FOR THE YEAR ENDING DECEMBER 31, 1909."

It is significant that, in the case of the corporation tax, under Section 38 of the Act, "the year ending December 31, 1909," is specifically mentioned.

This form of language indicates a clear legislative intent to make the corporation tax operate retroactively. On August 5, 1909, Congress says that the tax shall be computed for the year ending December 31, 1909. That year, of course, began on January 1, 1909, and the legal effect is exactly the same as though Congress had said that corporations should pay a tax for the year beginning January 1, 1909.

If a similar legislative intent had existed as to the tax on yachts, Congress would have used a similar form of words to express that similar intent, and Congress would have said that the yacht tax was to be levied on an ownership during "the six months ending September 1, 1909."

It is a most significant and pregnant fact that Section 37, in creating the yacht tax does *not* use any such form of expression as "the six months ending September 1, 1909."

This difference in language between the corporation tax in Section 38 and the yacht tax in Section 37 points to a difference in legislative intent. And while the language employed in Section 38 as to corprations conclusively entails a retroactive operation for the corporation tax, so the totally different language in Section 37 as to yachts with equal conclusiveness forbids a retroactive operation for the yacht tax.

I. THE HISTORY OF SECTION 37 IN CONGRESS SHOWS THAT IT WAS INTENDED TO OPERATE PROSPECTIVELY AND NOT RETROACTIVELY.

There is the strongest kind of internal evidence that Congress did not intend this act to have a retroactive operation, as will appear from the history of Section 37 in Congress.

The subject-matter which afterwards became Section 37 of the Act was not introduced in the House at all. It appeared for the first time after the bill had passed the House and had gone to the Senate and had been referred to the Senate Committee on Finance.

The following proceedings then appear:

Congressional Record, 61st Congress, p. 1573 (read in Senate April 23, 1909).

April 14, 1909, H. R. Bill No. 1438 reported back to the Senate by the Senate Committee on Finance with amendments, among others an amendment as follows:

"The next amendment (of the Committee on Finance) was, on page 187, after line 9, to insert:

"471a. Upon any foreign-built yacht, pleasure boat, or vessel not used or intended to be used for trade, *purchased after the passage of this act* by a citizen of the United States, there shall be levied and collected a duty of 35 per cent. ad valorem, to be payable at the time of the first arrival of said yacht within the jurisdiction of the United States after said purchase if said yacht was purchased outside the jurisdiction of the United States, or at the time of the purchase if said yacht was purchased within the jurisdiction of the United States, but this duty shall not be levied more than once on the same yacht. Any yacht upon which the duty has been paid as above prescribed shall be entitled to all the privileges and shall be subject

to all the requirements prescribed by Sections 4214, 4215, 4217 and 4218 of the Revised Statutes and acts amendatory thereto in the same manner as if said yacht had been built in the United States, and shall be subject to tonnage duty and light money only in the same manner as if said yacht had been built in the United States. So much of Section 5 of Chapter 212 of the Laws of 1908, approved May 28, 1908, as relates to yachts built outside the United States and owned by citizens of the United States shall not be applied to yachts on which duty has been paid as prescribed in this section."

"The amendment was agreed to." (No debate.)

July 8, H. R. Bill No. 1438 passed the Senate with the foregoing amendment.

July 30, the Committee of Conference of the Senate and House (C. R., 4851) adopted a substitute section in lieu of Senate Paragraph 471a, as follows (C. R., 4859):

"The House recedes from its disagreement to the Senate amendment and agrees to the same with an amendment as follows:"

(Here follows section 37 of the Act as passed.)

It is entirely obvious from a reading of the section, as originally proposed by the Senate Committee on Finance, and the act, as passed, that the words "*purchased after the passage of this act*" in the Senate amendment, were intended to be the legal equivalent of the words "*now or hereafter owned or chartered for more than six months*" in the act as passed. Both forms of expression look to the future and not to the past.

II.

(Second assignment of error in action No. 1.)
(First and Second assignments of error in action No. 2.)

The act does not levy a tax, but deprives defendant of his property without due process of law.

A. THE TAX IS NOT LAID ON ALL YACHTS, BUT ONLY ON FOREIGN BUILT YACHTS.

B. THE TAX DOES NOT PROFESS TO LEVY A DUTY ON IMPORTS (SEE INFRA III, A), AND THEREFORE THERE IS NO REASON WHY FOREIGN BUILT YACHTS SHOULD BE SINGLED OUT FOR THE PURPOSE OF THE TAX, AND ALL OTHER YACHTS EXEMPTED.

After a foreign built yacht has been brought into the waters of the United States by her owner, she becomes a part of the general personal property of the country and subject to general taxation, like all other personal property. But we submit that it is an illegal discrimination for Congress to mark out as a subject for taxation a yacht, merely because of the fortuitous circumstances, that in the past she was built in a foreign country.

As this point has been very elaborately and thoroughly developed in Mr. Guthrie's brief, no duplication of his argument will be attempted here.

III.

(Third assignment of error in action No. 1.)
(First, Second and Third assignment of error in action No. 2.)

The thirty-five per cent. duty is a direct tax, and void because not apportioned.

A. THE TAX IS NOT, AND DOES NOT PROFESS TO BE, A DUTY ON IMPORTS.

It is entirely clear from a reading of the act that it does not lay a duty on imports. The tax is laid on *all* foreign built yachts owned or chartered by American citizens for a period of over six months, no matter whether such yachts be in American waters or in foreign waters, or whether such yachts may never have been brought into American waters at any time. As the act is applicable to *all* foreign built yachts, and not merely to foreign built yachts imported into American waters, it is quite clear that the act cannot be held to be a duty on imports.

B. AS THE 35 PER CENT. TAX CANNOT BE SUSTAINED AS A DUTY ON IMPORTS, IT MUST BE A TAX ON PERSONAL PROPERTY.

But a tax on personal property is a direct tax.

Pollock *v.* Farmers Loan & Trust Co., 158 U. S., 601 (1895).

Mr. Chief Justice FULLER speaking for the Court said, at page 610:

"The report of Oliver Wolcott, Jr., Secretary of the Treasury, to the House of Representatives on Direct Taxes, December 14, 1796, says:

"The duty enjoined is to 'report a plan for laying and collecting *direct taxes* by apportionment among the several States agreeably to the rule prescribed by the Constitution; adopting the same as nearly as may be to such objects of direct taxation and such modes of collection, as may appear by the laws and practice of the States respectively to be most eligible in each,'" recommends a direct tax of $1,484,000, and states the apportionment thereof among the States. The report states among the articles taxed in States, in addition to land, as follows:

* * * * * *

Massachusetts: *Vessels* * * *
New Jersey: *Vessels.*"

At page 637:

"Taxes on personal property or on the income of personal property, are likewise direct taxes."

C. BUT A DIRECT TAX MUST BE APPORTIONED.

Constitution of the United States, Art. 1, Sec. 2, Cl. 3:

"Representatives and direct taxes shall be apportioned among the several States which may be included within this union, according to their respective numbers, which shall be determined by * * * census."

Constitution of the United States, Art. 1, Sec. 9, Cl. 4:

"No capitation, or other direct tax shall be laid, unless in proportion to the census or enumeration herein before directed to be taken."

D. CONFESSEDLY, THE PRESENT TAX IS NOT APPORTIONED AMONG THE SEVERAL STATES.

Therefore the 35 per cent. ad valorem tax falls, as being a direct tax and not apportioned.

IV.

(Fourth assignment of error in action No. 1.)
(First, Second and Third assignments of error in action No. 2.)

The seven dollar per ton annual tax on the use of the yacht is an excise tax or indirect tax, and void for want of uniformity.

A. AN EXCISE TAX IS AN INDIRECT TAX.

U. S. *v.* Hylton, 3 Dall., 171.

B. INDIRECT TAXES ARE SUBJECT TO THE REQUIREMENT OF TERRITORIAL UNIFORMITY.

Knowlton *v.* Moore, 178 U. S., 41 (1899).

The provision in Section 8 of Art. 1 of the Constitution of the United States that "all duties, imposts and excises shall be uniform throughout the United States" refers to a purely geographical uniformity, and is synonymous with the expression "to operate generally throughout the United "States."

C. UNDER THIS ACT TWO OR MORE YACHTS OF SUBSTANTIALLY EQUAL TONNAGE BUT SUBSTANTIALLY UNEQUAL VALUE MAY BE UNEQUALLY TAXED ON SUCH EQUAL TONNAGE IN TWO DIFFERENT STATES; AND TWO OR MORE SUCH YACHTS OF SUBSTANTIALLY EQUAL VALUE BUT SUBSTANTIALLY UNEQUAL TONNAGE MAY BE UNEQUALLY TAXED ON SUCH EQUAL VALUE IN TWO DIFFERENT STATES; AND ONE OR MORE SUCH YACHTS MAY BE TAXED IN ONE STATE OF THE UNITED STATES IN A CERTAIN SUM AT THE RATE OF SEVEN DOLLARS PER GROSS TON, IRRESPECTIVE OF THE VALUE THEREOF, AND

ANOTHER SUCH YACHT OR YACHTS IN ANOTHER STATE AND SUBSTANTIALLY SIMILAR IN VALUE AND TONNAGE TO THE FIRST MENTIONED YACHT MAY BE TAXED IN A SUBSTANTIALLY DIFFERENT SUM AT THE RATE OF 35 PER CENT. OF THE VALUE THEREOF, IRRESPECTIVE OF THE TONNAGE THEREOF.

V.

(Fifth assignment of error in Action No. 1.)

Defendant's use of the yacht prior to August 5, 1909, tax-free, was property. In order to make the tax fall due September 1, 1909, it is necessary to destroy such tax-free use of the yacht prior to August 5, 1909, which is a deprivation of property without due process of law.

A. PRIOR TO AUGUST 5, 1909, DEFENDANT WAS IN FULL POSSESSION OF THE RIGHT, TITLE, PRIVILEGE AND IMMUNITY OF USING HIS YACHT, FREE AND CLEAR OF ANY TAX OR DUTY OR CHARGE SUCH AS THIS TAX OF SEVEN DOLLARS PER GROSS TON OR THIS DUTY OF 35 PER CENT. AD VALOREM.

The answer so alleges, and such in fact was the case.

B. THE RIGHT, TITLE, PRIVILEGE AND IMMUNITY ABOVE MENTIONED WAS PROPERTY WITHIN THE SCOPE AND MEANING OF THE FIFTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

The use and enjoyment of property is practically an interchangeable term with property itself. Property is of value only as it is used and enjoyed.

Pollock *v.* Farmers Loan & Trust Co., 158 U. S., 601.

C. THE COMPLAINT ALLEGES, AND IN ORDER TO SUSTAIN ACTION NO. 1 THE COURT MUST HOLD, THAT THE TAX BECAME DUE ON SEPTEMBER 1, 1909.

Therefore, in order to sustain action No. 1, the Court must hold that the tax became due on September 1, 1909.

D. BUT IN ORDER TO MAKE THE TAX FALL DUE ON SEPTEMBER 1, 1909, IT IS NECESSARY TO TAX AND PENALIZE DEFENDANT'S USE OF THE YACHT FOR A PERIOD OF SIX MONTHS, BEGINNING MARCH 1, 1909, AND ENDING SEPTEMBER 1, 1909.

The act lays the tax *not* on *all* foreign built yachts, but only on a certain class of foreign built yachts, viz., foreign built yachts *"now or hereafter owned or chartered for more than six months"* by a citizen.

The act further provides that the tax "shall be "levied and collected annually on the first day of "September."

It is therefore clear that in order to make the tax payable on September 1, 1909, as claimed by the Government, there must have been an antecedent ownership or charter for a period of six months, i. e., an ownership or charter beginning on March 1, 1909. And the act, according to the Government's contention, lays a tax on that ownership or charter, from March 1, 1909, to September 1, 1909.

E. THE ACT OF CONGRESS, ON AUGUST 5, 1909, IN TAXING AND PENALIZING DEFENDANT'S USE OF THE YACHT FOR THE PERIOD PRIOR TO AUGUST 5, 1909, ANNULLED AND DESTROYED AND TOOK AWAY DEFENDANT'S RIGHT, TITLE, PRIVILEGE AND IMMUNITY SET FORTH IN PARAGRAPH A.

Prior to August 5, the defendant had enjoyed the use of his yacht free and clear of any tax. During that time he had enjoyed and consumed that use of the yacht, in exactly the same fashion that he had consumed the smoke of his cigars, the nourishment of his food, and the warmth and protection of the clothing that he wore during that period.

Although we have made diligent search of the reported cases, we are unable to find an instance prior to the corporation tax in the act of August 5, 1909, where Congress has passed a tax law which purported to lay a tax that should reach back into the past and should become retroactively operative over a period anterior to the date of the act. Such legislation, had it ever been passed, while not obnoxious to the *ex post facto* clause (Art. 1, Sec. 9, Cl. 3, U. S. Const.), we submit would fall squarely across the 5th amendment which forbids the deprivation of property without due process of law.

The mere fact that during the entire course of our national life, through all the stress of financial panic and civil and foreign war, Congress has never yet attempted to pass a retroactive tax law, is at least some indication that Congress did not consider that it had the power so to do.

The taxing power has been freely and variously exercised by Congress since the foundation of the republic, but before the 5th day of August, 1909, no Congress had passed a retroactive tax law. If the power be conceded to exist, where shall it end?

If Congress on August 5th can tax me for owning a yacht on April 1, then it can tax me for owning a yacht or any other property five years ago. It can tax me whether or not that property has been meanwhile lost, destroyed or sold.

F. THE ANNULMENT, DESTRUCTION AND TAKING AWAY, ON AUGUST 5, 1909, OF DEFENDANT'S SAID RIGHT, TITLE, PRIVILEGE AND IMMUNITY, WHICH HE HAD PREVIOUSLY POSSESSED AND ENJOYED PRIOR TO AUGUST 5, 1909, WAS A DEPRIVATION OF DEFENDANT'S PROPERTY WITHOUT DUE PROCESS OF LAW, WITHIN THE SCOPE AND MEANING OF THE FIFTH AMENDMENT OF THE CONSTITUTION OF THE UNITED STATES.

Lewis *v.* Pa. R. R. Co., 220 Pa., 317 (Sup. Ct., Pa., 1908), at p. 323:

"A legal exemption from a demand made by another, is a vested right which the legislature may not interfere with. Even an expressed purpose that an act shall have such retroactive effect, is without avail."

The Court cites:

Cooley's Constitutional Limitation, p. 528:

"So he who was never bound either legally or equitably cannot have a demand created against him by mere legislative action."

VI.

(Sixth assignment of error in action No. 1.)
(Fifth assignment of error in action No. 2.)

A recovery in this action would destroy rights vested in the defendant under the British Treaty of 1815, and would deprive the defendant of his property without due process of law.

A. THE TREATY PROVIDES AS FOLLOWS:

Treaty of July 3, 1815, between the United States and Great Britain.

Art. 2, Cl. 2:

"No higher or other duties or charges shall be

imposed in any of the ports of the United States on British vessels, than those payable in the same ports by vessels of the United States."

By Art. 5, the duration of the treaty is to be four years.

Treaty of October 20, 1818, between the United States and Great Britain.

Art. 4 extended the treaty of July 3, 1815, "for the term of ten years from the date of the signature of the present convention" (viz., Oct. 20, 1818).

Treaty of August 6, 1827, between the United States and Great Britain.

Art. 1:

Indefinitely extended the treaty of July 3, 1815, as extended October 20, 1818, and provided that the treaty might be abrogated by either party giving to the other twelve months' notice of a desire to terminate it.

No such notice has even been given.

The treaty of 1815 was, therefore, in full force until August 5, 1909, and is still in force except as modified by the Act of August 5, 1909.

B. A TREATY IS OF EQUAL FORCE WITH AN ACT OF CONGRESS.

Article VI, Constitution of the United States:

"This constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land."

9 Fed. Stats., Annotated, 223:

"By the constitution, a treaty is placed on the same footing, and made of like obligation, with an act of legislation. Both are declared by that instrument to be the supreme law of the land, and

no superior efficacy is given to either over the other."

C. DEFENDANT'S YACHT IS A BRITISH VESSEL WITHIN THE MEANING OF THE TREATY.

Sec. 4131 Rev. St., as Amended 1884, 1896:

"Vessels registered pursuant to law *and no "others*, except such as shall be duly qualified ac- "cording to law for carrying on the coasting or "fishing trade, shall be deemed vessels of the "United States, and entitled to the benefits and "privileges appertaining to such vessels."

It is therefore clear that in order to be deemed a vessel of the United States, a vessel has to be registered (except vessels engaged in the coasting or fishing trade, which of course are beside the present discussion).

It, therefore, becomes important to determine what vessels may be registered; because if a vessel cannot be registered, she cannot be deemed a vessel of the United States (except coasting or fishing vessels).

Now, Sec. 4132, Rev. Stat., 1877, provides that:

"Vessels built within the United States, and "belonging wholly to citizens thereof, and vessels "which may be captured in war by citizens of the "United States, and lawfully condemned as prize, "or which may be adjudged to be forfeited for a "breach of the laws of the United States, being "wholly owned by citizens, *and no others*, may be "registered as directed in this title."

Therefore, in order to entitle a vessel to registry, she must possess one of the following characteristics:

1. She must be built within the United States, or

2. She must be captured in war by citizens of the United States and lawfully condemned as prize, or

3. She must be adjudged to be forfeited for a breach of the laws of the United States.

Unless a vessel can fulfill one of these three conditions, she is not entitled to register; and unless a vessel can register, she cannot be deemed a vessel of the United States.

Foreign built yachts, therefore, are clearly not entitled to register as American vessels, and as a matter of fact, and of executive action and interpretation, foreign built yachts have never been considered American vessels; for example, they are not subject to the inspection laws of the United States in reference to hulls, boilers, machinery, etc., as are American vessels; neither are they subject to regulation as to the nationality of their officers, as are United States vessels; nor can they fly the American yacht ensign.

A "yacht" is a "vessel."

The Miranda, 47 Fed. R., 815, affirmed 51 Fed. R., 523.

The exception made in Rev. Stat. U. S., Sec. 4226, exempting from the payment of light money "unregistered *vessels* owned by citizens of the "United States and carrying a sea letter or other "regular document issued from a custom house of "the United States, proving the vessel to be Ameri-"can property," applies to a foreign built unregistered *yacht* carrying a collector's certificate that the owner is an American citizen and that the bill of sale for such vessel has been recorded in the Custom House.

Section 37 of the Act of August 5, 1909, uses

the term "yacht" and "vessel" as interchangeable, *e. g.*, the expression "yacht, pleasure boat or vessel" is used three times in the body of Section 37, viz., in

Paragraph 1, line 4
" 2, " 2
" 2, " 3 and 4

again after using the word "yacht" alone in three places, viz.:

Paragraph 2, line 9
" 2, " 11
" 3, " 3

the Act uses the word "vessel,"

Paragraph 4, line 1.

It is, therefore, clear that the Congress which passed this act deemed the terms "yacht" and "vessel" to be interchangeable.

The Government contends that the "Cassandra" is not a British vessel under the purview of the Merchant Shipping Act of 1894.

But from this it by no means follows that the "Cassandra" is not a British vessel within the purview of the treaty of 1815.

The treaty of 1815 was a commercial treaty, and under it, it is perfectly proper to consider vessels not only as *agents* of commerce, but also as *articles* of commerce.

That is to say, vessels are not only of commercial importance from the fact that they *carry personal property*, but also from the fact that they are themselves *articles of personal property*, and as such form a very important contribution to international commerce. It is matter of common knowledge that vessels can be built about 35%

cheaper in Great Britain than in the United States, and the result has been that practically all large yachts for American owners have been built in England. This has brought large sums of money to the British shipyards, and there is nothing in the treaty of 1815 to show that such commerce in the *building* of ships was less to be protected than the commerce *carried by* ships.

D. SECTION 37 OF THE ACT OF AUGUST 5, 1909, IMPOSES A "DUTY OR CHARGE" WITHIN THE MEANING OF THE TREATY OF 1815.

The words used in the treaty are "Duty or charge." These words include:

1. A tonnage duty.
2. An excise tax.

It, therefore, matters not whether the Act of 1909 be construed as laying a tonnage duty or an excise tax. In each case the words of the treaty apply.

1. Tonnage duties.

The federal constitution uses the words "duty of tonnage," Art. 1, Sec. 10, Cl. 3.

2. Excise taxes.

Hylton *v.* U. S., 3 Dall., 171 (S. C. U. S., 1796).

CHASE, J.: "I think an *annual tax on car-*
"*riages* for the conveyance of persons may be con-
"sidered as within the power granted to Congress
"to lay *duties*. The term *duty* is the *most com-*
"*prehensive* next to the generical term tax."

Thomas *v.* U. S., 192 U. S., 363 (1904) at page 370.

The words duties, imposts and excises were

used comprehensively in the constitution "to "cover customs and *excise duties* imposed on im- "portation, consumption, manufacture and sale "of certain commodities, privileges, particular "business transactions, vocations, occupations and "the like."

E. IN ORDER TO SUSTAIN THE PRESENT ACTION, THE ACT MUST BE GIVEN A RETROACTIVE INTERPRETATION.

This is elaborated elsewhere in this brief.

F. A RETROACTIVE INTERPRETATION OF THE ACT OF 1909, WILL RESULT IN A DESTRUCTION OF THE RIGHTS VESTED UNDER THE TREATY OF 1815.

Prior to August 5, 1909, there was in full force and effect between the United States and Great Britain the above-mentioned treaty, which was of exactly the same dignity as an act of Congress, which said in express terms that the defendant's yacht should not be taxed.

During that period prior to August 5, 1909, the defendant was enjoying that right and had the benefits and advantages thereof. The Government contends that the Act of August 5 went back, undid the past, annihilated the rights enjoyed under the treaty prior to August 5, and in categorical fashion did the thing forbidden by the fifth amendment, in that it took the defendant's property without due process of law.

G. CONGRESS HAS NO POWER TO RETROACTIVELY ANNUL A TREATY, IF, IN SO DOING, IT DESTROYS VESTED RIGHTS.

U. S. *v.* Reese, 5 Dillon, 405 (U. S. C. C., W. D. Kan., 1879).

The Court said:

"Congress has no constitutional right to inter-

fere with rights under treaties, except in cases purely political."

Chew Heong *v.* United States, 112 U. S., 536 (1884).

The treaty of November 17, 1880, between the United States and China, provided that the United States might regulate the immigration of Chinese laborers; but that "*Chinese laborers who are now in the United States shall be allowed to go and come of their own free will and accord,* and shall be accorded all the rights, privileges, immunities and exemptions which are accorded to the citizens and subjects of the most favored nation."

The act of Congress of May 6, 1882, as amended July 5, 1884, prohibited the immigration of Chinese laborers, and provided that Chinese laborers who were in the United States at the time of the treaty, and who thereafter left the United States, must produce a certificate in a certain form in order to be readmitted to the country.

The petitioner, a Chinese laborer, resided in the United States at the time of the treaty (November 17, 1880), and departed from the United States by sea, prior to May 6, 1882, and remained out of the United States until after July 5, 1884. In September, 1884, he attempted to land from a steamer in San Francisco and was not permitted to do so, as he did not produce the certificate mentioned in the Act of 1884.

Held: That the petitioner was not bound to produce any such certificate.

Courts uniformly refuse to give to statutes a retrospective operation, whereby rights previously vested are injuriously affected, unless compelled to do so by language so clear and positive as to leave no room to doubt that such was the intention of the Legislature.

HARLAN, J.: "'Treaties of every kind,' says Kent, 'are to receive a fair and liberal interpretation, according to the intention of the contracting parties, and are to be kept in the most scrupulous good faith.' * * * Aside from the duty imposed by the constitution to respect treaty stipulations when they become the subject of judicial proceedings, the Court cannot be unmindful of the fact, that the honor of the government and people of the United States is involved in every inquiry whether rights secured by such stipulations shall be recognized and protected. And it would be wanting in proper respect for the intelligence and patriotism of a co-ordinate department of the government, were it to doubt, for a moment, that these considerations were present in the minds of its members when the legislation in question was enacted." * * *

The Court continues at page 559: "Words in a statute ought not to have a retrospective operation unless they are so clear, strong and imperative that no other meaning can be annexed to them, or unless the intention of the legislature cannot be otherwise satisfied; and such is the settled doctrine of this court."

This language of the Court in 1884 accords in striking manner with the following expressions by the first Chief Justice of the nation.

Jay in the Federalist, No. 64:

"Others though content that treaties should be made in the mode proposed, are averse to their being the supreme laws of the land. They insist, and profess to believe, that treaties, like acts of assembly, should be repealable at pleasure. This idea seems to be new and peculiar to this country, but new errors, as well as new truths, often appear. These gentlemen would do well to reflect

that a treaty is only another name for a bargain, and that it would be impossible to find a nation who would make any bargain with us, which should be binding on them absolutely, but on us only so long and so far as we may think proper to be bound by it. They who make laws may, without doubt, amend or repeal them; and it will not be disputed that they who make treaties may alter or cancel them; but still let us not forget that treaties are made, not by only one of the contracting parties, but by both; and, consequently, that as the consent of both was essential to their formation at first, so must it ever afterwards be to alter or cancel them. The proposed constitution, therefore, has not in the least extended the obligation of treaties. They are just as binding, and just as far beyond the lawful reach of legislative acts now as they will be at any future period or under any form of government."

Congress never intended that this Act should retroactively annul the treaty.

A. THE TREATY OF 1815 PROVIDES THAT A NOTICE OF 12 MONTHS SHALL BE GIVEN IN CASE OF ANNULMENT.

B. NO SUCH NOTICE HAS BEEN GIVEN.

C. IT EXPRESSLY APPEARS FROM THE RECORDS OF CONGRESS IN JULY, 1909, THAT CONGRESS DID NOT INTEND TO ANNUL THE TREATY.

Congressional Record for July 6, 1909, page 4275. Senator Elkins introduces an amendment to H. R. Bill, 1438, as follows:

"On all goods, wares and merchandise, and articles of every kind imported in ships or vessels of the United States there shall be allowed a

reduction of 5 per cent. on the duties prescribed by law, to be levied, collected, and paid on such goods, wares and merchandise."

Senator Root, on page 4276, says:

"It would involve the termination, or probably the violation, of a series of treaties."

The treaty of 1815 with Great Britain was then referred to, page 4276.

On page 4277:

"Mr. Aldrich, I shall have to say to the Senator from West Virginia (Elkins) that the committee will not accept this amendment."

D. IF POSSIBLE, EFFECT SHOULD BE GIVEN BOTH TO THE TREATY AND TO THE ACT OF CONGRESS.

E. IT IS POSSIBLE FOR BOTH THE TREATY AND THE ACT TO STAND, BY EXCEPTING BRITISH BUILT YACHTS FROM THE OPERATION OF THE ACT.

VII.

(Seventh assignment of error in action No. 1.)

(First, Second and Fourth assignments of error in action No. 2.)

The Act does not authorize any action in personam against the owner or managing owner.

A. AN ACT LEVYING A TAX MUST BE STRICTLY CONSTRUED.

B. THIS ACT DOES NOT SPECIFY WHO SHALL PAY THE ANNUAL TAX OF $7 PER GROSS TON.

C. IT IS NOT PERMISSIBLE TO READ INTO THE ACT LANGUAGE WHICH IS NOT FOUND THERE, AND THE ACT DOES NOT PROVIDE THAT THE OWNER OR MANAGING OWNER OR ANYONE ELSE SHALL PAY THE TAX OF $7.00 PER GROSS TON.

D. THE OTHER SECTION OF THE YACHT TAX ACT SPECIFIES WHO SHALL PAY THE TAX THERE LEVIED, BUT THIS SECTION DOES NOT.

E. OTHER SECTIONS OF THE ACT OF AUGUST 5, 1909, SPECIFY WHO SHALL PAY THE TAX (SECTION 28, SEC. 38).

F. SIMILAR TAXES IN THE PAST HAVE SPECIFIED THAT THE OWNER MUST PAY THE TAX, SEE SEC. 3, ACT OF JUNE 5, 1794, CH. 45, WHICH WAS IN ISSUE IN THE HYLTON CASE.

This section reads as follows:

"Sec. 3. That *every person having or keeping a carriage* which by this act is or are made subject to the payment of duty shall within the month of September in each year make entry of the same with the officer of inspection of the district in which he or she shall reside and *pay* the duty thereon.

VIII.

(Eighth assignment of error in action No. 1.)

(First and Second assignments of error in action No. 2.)

The yacht tax, Section 37 of the Act of August 5, 1909, is void, as it is a bill for raising revenue; and it originated in the Senate and not in the House of Representatives.

A. ARTICLE 1, SECTION 7 OF THE CONSTITUTION OF THE UNITED STATES, PROVIDES AS FOLLOWS:

"Revenue bills. All bills for raising revenue shall originate in the House of Representatives; but the Senate may propose or concur with amendments as on other bills."

B. H. R. BILL, 1438, ORIGINATED IN THE HOUSE OF REPRESENTATIVES. AFTER IT HAD PASSED THE HOUSE, AND BEFORE IT WENT TO THE SENATE IT CONTAINED NO REFERENCE WHATEVER TO ANY TAX ON FOREIGN BUILT YACHTS.

C. THE TAX ON FOREIGN BUILT YACHTS WAS BODILY INSERTED BY THE SENATE—NOT TO REPLACE ANYTHING WHICH HAD BEEN PREVIOUSLY PROPOSED BY THE HOUSE, BUT AS A TOTALLY NEW SUBJECT MATTER, AND UNDER A TOTALLY NEW SECTION, AND FOR A TOTALLY NEW PURPOSE NOT MENTIONED OR SUGGESTED OR CONTEMPLATED BY THE HOUSE. THE HOUSE BILL HAD TO DO WITH DUTIES ON IMPORTS. THE SENATE BILL (IT WOULD BE INACCURATE TO SPEAK OF IT AS AN AMENDMENT) HAD TO DO WITH AN EXCISE TAX.

D. THE INTERPOLATION OF SECTION 37 WAS NOT AN "AMENDMENT" BY THE SENATE.

The word "amendment" necessarily implies some antecedent, pre-existing, thing, upon which the amendment can operate.

Re Pennsylvania Tel. Co., 2 Chest. Co. Rep. (Pa.), 129, 131.

"It necessarily implies something upon which the correction, alteration, improvement, or reformation can operate; something to be reformed, corrected, rectified, altered, or improved. In other words, that which is proposed as an amendment must be germane to or relate to the thing to be amended."

Warren *v.* Crosby, 34 Pac., 661.

Where * * * an act is complete and perfect in itself and not amendatory or revisory in its

character, though such law by implication amends other statutes on the same subject, it is not an amendment.

State *v.* Smith, 28 N. W. R., 241.

"An amendatory law is a statute for the amendment, *not of what might have been enacted,* under the title of the original statute, *but what was enacted; not of what the original law might have been, but what it was.*"

Hence, in the case at bar, it will not do for the Government to argue that H. R. bill No. 1438 was an "Act to provide Revenue" and that under that title the House *might have taxed* foreign built yachts. The conclusive answer to that is, that the House did not tax foreign built yachts.

The Senate injected into H. R. Bill, 1438, a totally new and distinct subject matter, in nowise dependent upon any other portion of the act. Section 37 provides a self-contained scheme—a scheme which was intended to be complete—for taxing foreign built yachts.

Story on the Constitution, 4th Ed., p. 622, note:

"The 42nd Congress House passed a bill to repeal existing duties on tea and coffee The Senate substituted for it a bill containing a general revision, reduction and repeal of law imposing import duties and internal taxes, and sent the substituted bill to the House for concurrence."

The House resolved that this substitution was "in conflict with the true intent and purpose of that clause of the constitution which requires that all bills for raising revenue shall originate in the House of Representatives," and therefore ordered it to lie on the table. The Senate thereupon referred the subject to its Committee on Privileges and Elections, who reported that the House bill was not a bill for raising revenue, within the mean-

ing of the Constitution, and therefore while the Senate might have amended it so as to abolish duties altogether upon other articles, *the Senate had no right to ingraft upon it as it did in substance, an amendment providing that revenue should be collected upon other articles though at a less rate than previously fixed by law.* That amendment would have become a provision in the act for raising revenue, because revenue at a certain rate would have been collected by the operation of the act. This report was adopted by the Senate."

IX.

(Tenth and Eleventh assignments of error in action No. 1.)

The judgment in action No. 1 should be reversed.

X.

(Sixth and Seventh assignments of error in action No. 2.)

The judgment in action No. 2 should be reversed.

Respectfully submitted by

C. ANDRADE, JR.,

Of Counsel for Plaintiff-in-Error.

THE YACHT TAX CASES.

In the Supreme Court of the United States.

OCTOBER TERM, 1913.

UNITED STATES *v.* H. CLAY PIERCE.	Nos. 623, 624.
UNITED STATES *v.* CORNELIUS G. K. BILLINGS.	Nos. 625, 626.
UNITED STATES *v.* ROY A. RAINEY.	Nos. 627, 628.
UNITED STATES *v.* JAMES GORDON BENNETT.	Nos. 629, 630.
UNITED STATES *v.* HARRIET GOELET.	Nos. 631, 632.

ON CERTIFICATES FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

13608—13

H. CLAY PIERCE, PLAINTIFF IN ERROR,
v.
UNITED STATES. } Nos. 64, 65.

CORNELIUS K. G. BILLINGS, PLAINTIFF in error,
v.
UNITED STATES. } Nos. 66, 67.

ROY A. RAINEY, PLAINTIFF IN ERROR,
v.
UNITED STATES. } Nos. 73, 74.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

MOTION TO ADVANCE.

The Solicitor General, on behalf of the United States and opposing counsel, respectfully moves the court to advance the above-entitled causes pending upon certificate for hearing together with cases Nos. 64, 65, 66, 67, 73, and 74, now pending in this court upon writs of error to the Circuit Court for the Southern District of New York.

These are all actions in the nature of debt brought by the United States to recover taxes on foreign-built yachts laid by section 37 of the act of August 5, 1909. (39 Stat., 11.)

Each of the cases certified involves one or more of the following questions:

(1) The validity of the statute under the Fifth Amendment to the Constitution.

(2) Its application to yachts used and kept only in foreign waters or upon the high seas and wholly outside of the limits and territorial jurisdiction of the United States.

(3) Its application to a citizen of the United States permanently resident and domiciled in a foreign country.

(4) The power of Congress to levy such a tax upon yachts thus used and kept abroad.

(5) The power of Congress to levy the tax on such a yacht owned by a citizen of the United States resident and domiciled in a foreign country.

(6) The prospective or retrospective operation of the tax.

(7) The right of the United States to recover interest upon the tax in question.

Most of these questions, together with a few others involving the construction of the statute, arise in cases Nos. 64, 65, 66, 67, 73, and 74.

It would be difficult to prepare and file briefs in the certified cases within the time required by the rules if they should be heard when cases 64, 65, 66, 67, 73, and 74 are reached in the ordinary course. It is therefore suggested that all of the cases be assigned for argument on the first Monday in January, or as soon thereafter as the court may desire.

Counsel for all parties join in this motion and request.

JOHN W. DAVIS.
Solicitor General.

OCTOBER, 1913.

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